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ABSTRACT

The present system for the delivery of child welfare services to reservation Indians contains many issues of concern to responsible Federal and state government employees, and to Indians. The issues identified by the field research frequently center on questions of the proper respective spheres of authority of the governmental units involved--Federal, state, local, and Indian. Perspective and an understanding of the present system can best be gained by an examination of the historical development of this nation's policy toward Indians. The current system is an outgrowth of the vigorously debated, and often contradictory, notions of the past defining the Indians' position in American society. Therefore, this report begins with a summary of the historical development of the legal status of tribal Indians in the United States. The report then examines: Indian tribal government, courts, and legal systems; the current structure of child welfare programs for reservation Indians from a legal perspective; the basic legal problems flowing from the overlay of a federally funded, state administered child welfare system on the three governmental units (Indian, state, and local) concerned; recent attempts at solutions of the problems; and the legal implications of selected alternatives to the present system. (Author)

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REPORT TO THE CENTER FOR SOCIAL RESEARCH AND DEVELOPMENT, DENVER RESEARCH INSTITUTE

ON

LEGAL AND JURISDICTIONAL PROBLEMS IN THE DELIVERY OF CHILD WELFARE SERVICES TO INDIANS

CS009876

SHERMAN & MORGAN, P. C.
July 2, 1975

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This is the legal component of HEW Grant No. 08-P-57784/8-01, a study of the legal/jurisdictional problems in the delivery of SRS services to Indian reservations. There are many aspects to the existing system of delivery of services, however, that are not reflected in the written documents used for this legal research. These aspects are covered in the field component to this study.

Many of these legal/jurisdictional problems involve the application of state law, as well as federal and tribal law. Matters involving state law are examined in parts of this legal report, principally as examples of the types of problems that can arise. This report does not contain a complete analysis of all of the numerous variations in state statutes, regulations and attorney general opinions that can and do occur.

We wish to thank the many people who have unselfishly shared their time and thoughts about this complex subject. Among these people are Ray Butler, Director of Social Services, BIA; Robert Dublin, Special Assistant to the Assistant General Counsel, HEW; Nancy Evans, Assistant Area Social Worker, Navajo Area Office, BIA; Mario Gonzales, former Chief Judge, Rosebud Sioux Tribal Court; Francis Ishida, Acting Regional Commissioner, Region VIII, HEW; Clare Jerdone, Child Welfare Specialist, BIA; John Lewis, Executive Director, Southwest Indian Development Inc.; Diana Lim, Librarian, National Indian Law Library; Ray Myrick,

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LEGAL AND JURISDICTIONAL COMPONENTS
OF PROBLEMS ARISING IN THE DELIVERY
OF CERTAIN CHILD WELFARE SERVICES
TO RESERVATION INDIANS

-- Introduction --

The present system for the delivery of child welfare services to reservation Indians contains many issues of concern to responsible federal and state government employees, and to Indians. The issues identified by the field research frequently center on questions of the proper respective spheres of authority of the governmental units involved -- federal, state, local, and Indian.

Perspective and an understanding of the present system can best be gained by an examination of the historical development of this nation's policy toward Indians. The current system is an outgrowth of the vigorously debated, and often contradictory, notions of the past defining the Indians' position in American society. We therefore begin our report with a summary of the historical development of the legal status of tribal Indians in the United States (Section I).

The report then examines: Indian tribal courts and legal systems (Section II); the current structure of child welfare programs for reservation Indians from a legal perspective (Section III); the basic legal problems flowing from the overlay of a federally funded, state administered child welfare system on the three governmental units (Indian, state and local) concerned (Section IV); recent attempts at solutions of the problems (Section V); and the legal implications of selected alternatives to the present system (Section VI).

I. THE HISTORICAL DEVELOPMENT OF THE LEGAL STATUS OF TRIBAL INDIANS IN THE UNITED STATES

Indian Tribes as Governmental Units

The American tribal Indian is possessed of a legal status unique among the distinct groups composing our society. Briefly put, American tribal Indians retain many of the attributes of sovereignty available only to formally recognized governmental units, such as states or political subdivisions of states. These powers include the right to adopt and operate under a form of government of their own choosing, to define their tribal membership, to regulate the domestic relations of members, to tax, to control the conduct of their members by tribal legislation, and to administer justice through their own tribal court system.

The reasons for this unique legal status go back to the earliest days of the arrival of European settlers in North America. The governing bodies of the various European settlements concluded formal treaties with the governing bodies of Indian tribes before the United States came into being. The adoption of the United States Constitution reserved the responsibility of dealing with Indian tribes solely to the federal government, under Article I, § 8, clause 3 (regulating commerce with Indian tribes) and under Article II, § 2, clause 2 (the treaty-making power).

This fact is of crucial significance in the development of the legal status of Indian tribes, for it is the source of two major controlling legal principles: (1) the federal government, and not the separate states, is the ultimate arbiter of the legal status of tribal Indians through acts of Congress and (2) the use of treaties as a mode of dealing with tribal Indians establishes the aspects of sovereignty previously described in the tribe.

Indeed, the general welfare obligations of the federal government under the treaties are often regarded by the tribes as continuing to the present day and not extinguished by subsequent Acts of Congress. For example, it has been argued that the treaty

language by which the federal government assumed responsibility for the "welfare" of certain tribes has not been satisfied by later Acts of Congress setting up the broad welfare programs of the Social Security Act. From the viewpoint of virtually all federal and state administrators of Social Security Act programs, it is assumed that the Acts and programs satisfy the general welfare treaty obligations of the federal government. We have found no case law precisely on point, but we regard these opposing views as illustrative of the differing results one can reach in analyzing a problem, depending on the initial approach to it.

The United States Supreme Court, as the final authority of determining the legal meaning of the federal Constitution, defined the broad principles of federal, state and tribal governmental authority in two landmark decisions in the early years of the United States in Cherokee Nation v. Georgia[1] and Worcester v. Georgia.[2]

In Cherokee Nation, the Supreme Court considered the validity of Georgia state laws incorporating Indian lands into existing state counties, forbidding the Cherokee to engage in political activities, and asserting control over who could pass into or through the tribal lands. The Court found it had no jurisdiction to pass on the major question, but the significant language of the Court directed to describing the Cherokee nation's legal and governmental status called it "a domestic dependent nation."[3] This dictum has retained significant force ever since as a description of the self-governing status of tribal Indians.

In Worcester, the Supreme Court established the principle of federal plenary power over the regulation of Indian affairs. It held unconstitutional Georgia state laws regulating the

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1 30 U.S. (5 Pet.) 1 (1831).

2 31 U.S. (6 Pet.) 350 (1832).

3 30 U.S. (5 Pet.) 1, 12.

residence of non-Indians on tribal lands, thus precluding the exercise of state power in this area. Chief Justice Marshall further delivered, in dictum, the classic formulation of the theory underlying the principle of Indian sovereignty:

> The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties.[4]

> . . . the settled doctrine of the law of nations is, that a weaker power does not surrender its independence -- its right to self-government -- by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.[5]

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[6]

Thus we find clear indications of the federal Congress' plenary power in dealing with tribal Indians, and of the aspects of self-government and sovereignty in the tribes, from the earliest days in our federal Constitution and in United States Supreme Court decisions interpreting the Constitution. The final actor in the historical definition of tribal Indian legal status was the United States Congress. It continued to recognize the

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[4] 31 U.S. (6 Pet.) at 379.

[5] 31 U.S. (6 Pet.) at 380.

[6] 31 U.S. (6 Pet.) at 380.

attributes of tribal sovereignty by dealing with various tribes through treaties, as it embarked upon a policy of removing tribes to the West. In 1871, Congress ended the practice of making treaties.[7]

These are the major historical determinants of the self-governing powers of Indian tribes. Further discussion of the current limits of tribal sovereignty is detailed below, but it is necessary to recognize the principle at the outset -- American Indian tribes have substantial powers of self-government which establish the tribes as an additional level of government in the United States system, which is generally viewed as having only two tiers -- federal and state. This is the root cause of most of the legal and jurisdictional issues identified by this study.

Federal Legislation Expressing Policy Towards Indians

The difficulty of incorporating an additional level of government in the administration of general social policies through a federal-state system, encountered in the present structure for the delivery of child welfare services to reservation Indians, is further compounded by the inconsistent expressions of broad federal Indian policy.

Congress has responded to policy notions over the years by enacting legislation which vacillates between the contradictory goals of separation or assimilation for Indians. As one would expect from this pattern of policy, the federal laws have not wiped the slate clean with each swing of the pendulum, thus leaving remnants of laws at variance with policy directions subsequently taken. It is necessary to review the major expressions of federal policy towards Indians, found in the laws of the United States, to understand the present complex body of law governing the status of tribal Indians.[8]

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[7] Act of March 3, 1871, ch. 120, 16 Stat. 544.

[8] See the excellent summary in Comment, The Indian Battle for Self-Determination, 58 Cal.L.Rev. 445 (1970).

The practice of the Congress in the early years of European settlement of the eastern portion of the United States was generally to remove the tribes even further West, clearly expressing a policy of separation. However, shortly after the treaty-making practice was ended in 1871, Congress began to enact legislation which embodied the goals of assimilation of Indians into American civilization.

The United States Supreme Court had ruled in 1883 in Ex Parte Crow Dog[9] that a federal court had no jurisdiction to try a Sioux Indian for the alleged murder of a fellow Indian which occurred on reservation lands. The Congressional response to this decision was the Major Crimes Act of 1885,[10] which gave federal courts criminal jurisdiction over certain offenses committed between Indians on reservation lands.

Shortly thereafter, Congress then passed the most significant assimilationist legislation affecting Indians of the last century, the General Allotment Act of 1887.[11] The philosophy of this act was plainly designed to break up tribal institutions, as it gave the Chief Executive the authority to cause reservation lands to be divided and individual parcels of land to be given to the tribal individuals, eventually to become patented to the Indian allottee. At that time, the Indian was to become a citizen fully subject to the ordinary jurisdiction of the state. To a great extent, the assimilation and philosophy of this act was successful, at least in the alienation of tribal lands from their Indian owners. Approximately ninety million acres of land passed out of tribal control during the tenure of the Allotment

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9 109 U.S. 556 (1883).

10 Act of March 3, 1885, 18 U.S.C. § 1153 (1964).

11 General Allotment Act, ch. 119, 24 Stat. 388 (1887), as amended, 25 U.S.C. §§ 331-416j (1964).

Act.[12] Further assimilationist aims were expressed by mandatory school attendance laws for Indian children in 1893, at pain of withholding rations to Indian families for lack of compliance.[13]

The next significant expression of federal Indian policy followed the assimilationist philosophy as well. In 1924, Congress provided that Indians were to be citizens of the United States, and of the states in which they reside.[14]

The impact of the federal policies described in the laws just mentioned was far-reaching, and by many accounts, devastating in cumulative effect on Indian tribal life and culture.[15]

For whatever reasons, federal policy towards Indians took a sharp turn towards the separatism or tribal sovereignty end of the spectrum with the Wheeler-Howard or Indian Reorganization Act of 1934.[16] The purposes of the bill were variously described as "to stabilize the tribal organization,"[17] "to allow the Indian people to take an active and responsible part in the solution of their own problems,"[18] and "[t]o grant to Indians living under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise."[19]

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12 Brophy & Aberle, The Indian, America's Unfinished Business (1966). Ninety million acres is approximately equal to the combined area of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, and three-quarters of New York State.

13 Act of March 3, 1893, ch. 209, § 1, 27 Stat. 635.

14 Now codified in The Immigration and Nationality Act of 1952, 66 Stat. 163.

15 See, for example, the Meriam Report, Institute for Government Research, Studies in Administration, the Problem of Indian Administration (1928); Helen Hunt Jackson, A Century of Dishonor, 1881.

16 Act of June 18, 1934, ch. 576, §§ 1-18, 48 Stat. 984, 25 U.S.C. §§ 461-79 (1964).

17 S. Rep. No. 1080, 73rd Cong., 2nd Sess. 1 (1934)(By Senator Wheeler).

18 Letter from President Roosevelt, H. R. Rep. No. 1804, 73d Cong., 2 Sess. 8 (1934).

19 H. R. 7902, 73d Cong. 2d Sess. (1934).

The principle features of the bill ended the practice of allotment, restored land to tribal ownership, provided for tribal self-government under tribal constitutions, and were designed to reduce the need for Bureau of Indian Affairs administration dealing with internal Indian affairs.[20]

For the next 20 years, these goals of strengthening tribal institutions held sway, but in 1953 and 1954, Congress reversed its direction and enacted the paradigm of the 20th Century assimilationist philosophy, Public Law 280.[21]

Public Law 280 granted certain named states civil and criminal jurisdiction in Indian country and allowed any other state wishing to assert jurisdiction the power to do so unilaterally. The termination acts of 1954 put an end to the special federal relationship for the tribes specified and ended all federal services to those tribes (Menominee, Klamath, Texas tribes, and Paiute).[22] Further, the acts provided several ways of disposing of tribal lands. The overall effects of these two acts of Congress was to virtually eliminate the tribal status of certain named Indian tribes, and to allow states to assert civil and criminal authority with respect to all other Indian lands if the states so chose.

It is doubtful that any other federal Indian policy in this century elicited a stronger negative response from Indians than these assimilationist acts. Within 15 years, the Congress was moved to repudiate termination policy and strike a balance between

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20 Zimmerman, The Role of the Bureau of Indian Affairs Since 1933, 311 Annals 31 (1957).

21 Act of Aug. 15, 1953, ch. 505, 67 Stat. 588.

22 Act of June 17, 1954, ch. 303, 68 Stat. 250, 25 U.S.C. §§ 891-901 (1964)(Menominee); Act of Aug. 13, 1954, ch. 732, 68 Stat. 718, 25 U.S.C. § 564 (1964)(Klamath); Act of Aug. 23, 1954, ch. 831, 68 Stat. 768, 25 U.S.C. § 721 (1964)(Texas tribes); Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099, 25 U.S.C. §§ 741-60 (1964)(Paiute).

the assimilationist philosophy of 1953 and 1954, and the expressed desires of Indians to retain control over the rudiments of self-government.[23] The new governmental policy was eventually characterized as "Self-Determination without Termination."[24]

The policy was initially marked by permitting Indian tribes as "public agencies" to contract with different departments and agencies of the federal government for programs of aid and services previously available only to states and counties. Greater emphasis upon Indian tribes' making their own determinations of what they desired to do in governing themselves took place. In addition, federal funds were increasingly made available for the purpose of capacity building of Indian tribal governments.

This movement culminated with the Indian Civil Rights Act of 1968.[25] This act grants to individual Indians vis-a-vis their tribes many of the civil liberties guaranteed other American citizens by the Bill of Rights, including freedom of speech, religion, assembly, and press, and requires due process in Indian tribal laws. To this extent, the Act may be viewed as assimilationist,

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23 Termination reached its height during the Eisenhower Administration of the 1950's. In contrast, the Nixon Administration took a strong stand against termination. In his message on Indian affairs, July 13, 1970, President Nixon said:

> Because termination is morally and legally unacceptable, because it produces bad practical results and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to pass a new concurrent resolution which would expressly renounce, repudiate and repeal the termination policy as expressed by the House Concurrent Resolution 108 of the 83rd Congress. This resolution would affirm the integrity and rights to continued existence of all Indian tribes and Alaskan Native governments, recognizing that cultural pluralism is a source of national strength. . . . [It would] affirm for the Executive Branch. . . that the historic relationship between the Federal Government and the Indian communities cannot be abridged without the consent of the Indians.

24 See e.g., House Report No. 93-1600, 93d Congress, 2d Sess.: "While the Indian 'new deal' legislation of the 1930's brought some measure of Indian control and self-government, it fell far short of the current Administration policy of 'Indian Self Determination without Termination'." (p. 20)

25 Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 77, 25 U.S.C. §§ 1301-41.

since aspects of the Bill of Rights are at fundamental variance with Indian tribal law. However, the act also recognizes certain residual powers of tribal self-government, as it gives to any tribe the right to reject state assertion of civil or criminal jurisdiction over tribal lands and members and has served to strengthen tribal government by directing subsequent funding to the building up of tribal legal institutions.

Many of the most complex issues concerning the lawful spheres of tribal, state, and federal authority arose during the years 1953 to 1968, when certain states chose to assert various forms of civil or criminal jurisdiction over Indians within their boundaries. Since 1968, tribal consent may be withheld from any such state assertion of jurisdiction, and no tribes have since consented. Detailed treatment of this issue will be given later in this report, but it is certain that the fiendishly intricate maze of checkerboard jurisdiction existing in many states, where tribal and state authority is a function of land boundaries and the details of federal and state legislation, is in large part founded on the complexities of state assertion of jurisdiction under P. L. 280.

To finish this survey of the changing trends in federal legislation, we review briefly the Indian Self-Determination Act of 1975.[26] This law provides that the Secretaries of Health, Education and Welfare, and Interior may at the request of an Indian tribe contract with the tribe for the discharge of certain federal responsibilities, including delivery of health services under the control of the Indian Health Service and welfare services and assistance under the control of the Bureau of Indian Affairs; or make grants to tribes for the purpose of capability-building so that the tribes may undertake such contracts. To the

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26 Act of January 4, 1975, 88 Stat. 2203, 25 U.S.C. §§ 450, et seq.

extent that tribes assume these obligations, the effect will be to strengthen tribal self-government powers. At the time of this report, there is no history to show how the Act will influence state or tribal authority, but the potential is clearly there.

This brief summary of the changing federal policy towards Indians and its effects on the respective spheres of authority of tribal, state, and federal governments shows that our country has never settled on a consistent view of the status of Indians within American society. As one would expect, the periodic attempts to define the limits of each sovereign's authority are somewhat lacking in clarity and are subject to variance as the guiding philosophy changed. To complete the historical review, we now turn to an examination of the major judicial efforts to resolve the jurisdictional limits prescribed or implied by the federal legislative history recounted above.

The Limits of State, Tribal, and Federal Sovereignty as Shown by Judicial Decisions

There are three governing bodies -- federal, state and tribal units -- whose sovereignty must be defined in an analysis of the legal and jurisdictional components of problems arising in the delivery of child welfare services to reservation Indians. One way to proceed is to examine the sphere of authority of one of the units measured against any other unit. For the needs of this study, the critical relationships are (1) that of the tribe to the state governments and to the political subdivisions of the states, such as counties or regions, and (2) that of states to the federal unit when the federal unit acts as a surrogate for tribal interests.

This statement is not made to minimize the significance of jurisdictional conflicts which may arise between tribal units and federal units. However, those conflicts are of lesser importance for our study because the great majority of jurisdictional disputes affecting the delivery of child welfare services to tribal Indians arise

between tribes and states or counties and because it is reasonably clear that the federal government can, by act of Congress, define the federal-tribal relationship at will.

The analysis of certain critical attributes of sovereignty serves as a guideline for defining the sphere of authority of any government. Two of the most important attributes are:

(1) The power to regulate civil and criminal conduct of members of the community;

(2) The power to tax personal income and real property within the community.

We have seen that Indian tribes have the authority to regulate domestic relationships between and among members of the Indian community. Tribal laws concerning marriage, divorce, inheritance, and the status of children are valid within the limits of reservations generally for members of the Indian community and state laws have no effect.[27] It is also the case that Indian laws and codes, or federal laws, regulate criminal conduct between tribal members on reservation lands, and that state criminal laws or codes have no effect in the circumstances. It must be noted immediately that these general principles may be suspended by the assertion, since 1954, of state civil or criminal jurisdiction under P. L. 280.

It is therefore necessary, for various purposes in the administration of the child welfare services programs for reservation residents, to take account of tribal laws defining the legal status of Indian parents and children. As explained and further detailed in the next section of this report, major practical difficulties may arise in obtaining the written records of tribal court and council pronouncements on these matters, and this tends to undermine tribal institutional authority on these subjects. However,

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[27] Ex Parte Tiger, 41 S.W. 304 (1908).

legal theory clearly requires Indian law to be controlling.

With respect to the taxing powers, a substantial body of case law exists owing to predictably frequent litigation on this point among states, tribes, and the federal government.

The first significant decision is The Kansas Indians,[28] decided by the United States Supreme Court in 1867. This decision held that a state could not impose a land tax on reservation Indians, citing the exclusive jurisdiction of the federal government with respect to tribal Indians. Real property taxes by the states on tribal Indian lands are therefore forbidden, and have never been of significant concern in subsequent litigation.

However, the states have attempted to tap various other income sources related to tribal Indian activities, and the Supreme Court has handed down three major decisions defining the limits of state and tribal powers in the recent past.

Warren Trading Post v. Arizona Tax Commission[29] involved the question of whether a state could impose an income tax on profits generated by the operation of a business within an Indian reservation. The Court held that the federal authority pre-empted the field, and state law could not validly apply.

Two further clarifications of the respective sovereigns' power in the tax field were issued by the Supreme Court in 1973, Mescalero Apache Tribe v. Jones[30] and McClanahan v. Arizona Tax Commission.[31] The Court held in Mescalero that a state could impose a sales tax on a business activity operated by a tribe on off-reservation land. In McClanahan, the court ruled a state could not impose its income tax on an Indian whose entire income was generated from reservation sources.

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28 72 U.S. (5 Wall.) 737 (1867).

29 380 U.S. 685 (1965).

30 411 U.S. 145 (1973).

31 411 U.S. 164 (1973).

The reasoning of the court in McClanahan is useful in attempting to further define the powers of the state and the Indian governments, because this case is the most recent United States Supreme Court decision directly addressing the question of tribal and state powers. The Court characterizes the issue as the necessity "to reconcile the plenary power of the states over residents within their borders with the semi-autonomous status of Indians living on tribal reservation."[32] It notes that the tribal sovereignty doctrine had not remained static since the Worcester case:

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. . . .
>
> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States. . .[is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."[33]

This modern view of the tribal sovereignty doctrine, plus certain tests formulated by the Supreme Court, lead to general guidelines in assessing tribal and state authority.

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32 411 U.S. 164, 165.

33 411 U.S. 164, 172, 173 (1973).

The test most recently used was announced by the Court in Williams v. Lee.[34] The issue there was whether a state court had jurisdiction over a civil debt claim brought by a trader for a balance due from an Indian customer. The Court characterized the test as "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them,"[35] if Congress has not specifically acted on the question involved. The ruling was that the tribal court had sole jurisdiction to hear the case.

Many commentators have viewed this test as vague -- since arguably any state action affecting an Indian infringed on his rights to be ruled by his own laws. It has further been considered a departure from previous case law in that it allowed some leeway for state action if Congress had not acted, thus reversing classical federal pre-emption doctrine requiring Congress to give authority to the states before the states could act.

However, the test has been applied in certain contexts suggesting that where tribal authority has been exercised, such as by passage of an ordinance or by creation of a tribal institution for dealing with specified issues, the tribal authority has pre-empted that of the state and must be controlling. For example, in State ex rel. Merrill v. Turtle[36] a federal appeals court held state officials could not extradite an Indian fugitive to another state where a tribe refused extradition. The Court noted that the tribe had a law permitting extradition, but not to the particular demanding state.

If this formulation gains broader judicial recognition, then it may become somewhat simpler to accurately describe the respective limits of tribal and state authority.

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34 358 U.S. 217 (1959).

35 358 U.S. at 220.

36 413 F. 2d 683 (9th Cir. 1969).

For the present, we can summarize the historical development of the legal status of American Indians as follows:

(1) The federal government, acting through the United States Congress, is the final determinant of tribal Indian powers.

(2) The federal laws defining tribal Indian status to date have been inconsistent, as federal policies shifted between the goals of assimilation and separatism.

(3) Tribal units function, in areas where state jurisdiction has not been asserted under P. L. 280, as an additional level of government with substantial powers.

(4) The existence of this additional governmental unit causes significant friction in the administration of child welfare services for reservation Indians, as that system was designed for the two-tiered federal-state governmental structure.

(5) Resolution of any given conflict in asserted authority between tribes and states generally requires an examination of treaties, acts of Congress, state statutes, federal and state court decisions, tribal law, and various institutional regulations.

II. INDIAN TRIBAL GOVERNMENT, COURTS AND LEGAL SYSTEMS

This section gives a brief explanation of the nature and authority of tribal governments, including tribal courts, in both their theoretical and practical aspects, with particular emphasis upon child welfare related problems that may come to their attention. It is by no means complete. Rather, it attempts to highlight those features of the Indian court landscape that are important to an understanding of problems in child welfare service delivery to reservation communities.

Background of Tribal Governments

Indian languages were not written, although pictograph methods of communication existed, and their governmental structures were orally remembered. The first writing down of these structures was the written constitution of the Five Nations (Iroquois), which included democratic principles of initiative, recall, referendum and equal suffrage. Of other early written constitutions, those of the Five Civilized Tribes are most well-known.[1]

The imposition of treaty-making and reservations often made different bands within a tribe, even entirely different tribes into an artificial conglomerate, so that methods of governing--with which the new majority culture was more comfortable--were sometimes imposed. What now exists in Indian tribal governments generally represents a synthesis of traditional customs and Western cultural structures.

Traditional Customs

Certain traditional tribal customs have been legally recognized by state or federal courts and--because they are at

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[1]Cohen, Handbook of Federal Indian Law 128-129.

variance with state or federal procedures--deserve mention:

A. Under certain circumstances, informal traditional domestic procedures have been recognized as legally valid so long as they conform to tribal custom.[2] For example, the Code of Federal Regulations states: "The Tribal Council shall have authority to determine whether Indian custom marriage and Indian custom divorce for members of the tribe shall be recognized in the future as lawful marriage and divorce on the reservation . . ."[3]

B. Indian tradition tends to favor compensation for the victim of a crime rather than punishment. This is remarked upon in the newly proposed Model Code:

> "Subsection (b) of Section 125 is . . . intended . . . as a statutory recognition of the sentencing approach which is perhaps the most firmly rooted in Indian tradition and sense of justice--that of compensating the victim for the injury he suffered at the hands of a criminal offender. Even though this concept is unfamiliar to American jurisprudence no compelling reason was discovered why, if so desired, it cannot legally be used by Indian courts, as long as the restitution ordered is reasonable and fair."[4]

C. Religious customs are sometimes at a marked variance to those of Judeo-Christian society, but have been legally recognized.[5] For example, Montana states that it will not jeopardize the "age-old tribal dances, feasting or customary Indian celebrations" of the Indians of the Flathead reservation.[6]

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[2]Recent examples include 1) recognition by HEW, Bureau of Hearings and Appeals, of informal adoption procedure according to Zuni Tribal custom for purposes of Child's Insurance benefits Case of Helen C. Hustito o/b/o Kandess Melanie, Appeals Council, decided March 8, 1972; 2) recognition by District Juvenile Court of Indian custom as relevant to determination of abandonment by parent, In re Goodman, In the District Juvenile Court, Grand County, Utah, case 630231, 232 decided February 15, 1972.

[3]25 C.F.R. § 11.28(a).

[4]40 Fed. Reg. 16689, 16701 (1975).

[5]Perhaps the most striking recent example of this is the recognition of the Native American Church peyote practices on the Navajo reservation: ". . . it shall not be unlawful for any member of the Native American Church to transport into Navajo country, buy, sell possess or use peyote in any form in connection with the religious practices, sacraments or services of the Native American Church." 25 C.F.R. § 11.87 NH, July 25, 1973. Cf. the State of Arizona's position in Native American Church of Navajoland, Inc. v. Arizona Corporation Commission, 405 U. S. 901 (1972).

[6]Rev. Codes of Montana 1947, § 83-805.

Structure of Tribal Governments

Generally, tribal governments today fall into four categories:[7]

(1) Representative: The members of the tribe elect a governing body whose authority is given to them by a constituion which the members have approved.

(2) Combination of representative and traditional: Government officials are elected by members of the tribe; however some government positions are held by traditional leaders. The government officials operate under a constitution voted upon by members of the tribe.

(3) General Council: The members of the tribe have adopted bylaws governing the number of officers, elections, and so on. However, the officers have little substantive power and every time they wish to act, they must call a General Council of the tribe which then votes on the issue.

(4) Theocracy: The form of government of the Pueblos: both civil leaders and officers of the tribe are selected by the traditional religious leaders.

It should be noted that Indian governments are not compelled to have separation of power; the Indian Civil Rights Act of 1968 has not changed this proposition.[8] As a result, tribal chairmen--the executive arm of the government--are often chosen by the tribal council; generally, tribal chairmen have very

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[7]This disucssion is adapted largely from the excellent discussion in 2, Justice and the American Indians, The Indian Judiciary and the Concept of Separation of Powers, p., 24-29, published by National American Indian Court Judges Association. A list of tribes and their governing bodies can be found at House Appropriations Subcommittee for Department of Interior and Related Agencies, Fiscal Year 1974, 93rd Cong. 1st Sess., 513-521.

[8]In Dodge v. Nakai, 298 F. Supp. 26 (1969), the Court remarked: ". . . with respect to enforcement of the power of exclusion, the Navajo Tribal Code vests the Advisory Committee with judicial powers . . . Thus, the form of government utilized on the Navajo Reservation does not lend itself to the nice categorizations that may be made where the branches of government are distinct," at 33, and footnoted this remark with the statement: "The Navajo Tribe is not required to establish distinct branches of government."

restricted authority other than to preside at council meetings and to vote in case of a tie.

The selection of judges differs from tribe to tribe and often renders the judge particularly subject to legislative and political pressure. The judge may be elected by the tribe, or appointed by the council, the BIA agency superintendent, or the religious leaders of the tribe.[9] The judge's terms may run from one-year sessions in the case of judges selected by the council to two- or four-year sessions when elected.

The Types of Indian Courts

There are three basic types of Indian courts: traditional, Court of Indian Offenses, and tribal.

A. Traditional courts

"Traditional courts" refer solely to the courts of Indian pueblos in New Mexico. These courts are semi-religious in nature and part of the long-standing theocratic Pueblo heritage. There is no written code and the "governor" of the pueblo acts as judge. The Bureau of Indian Affairs is not informed as to court procedures. As presently constituted, the future of these courts is put in jeopardy by provisions of the Indian Civil Rights Act of 1968.[10]

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[9] In the Pueblos, the Governor, the titular leader, is generally the tribal judge.

[10] The Pueblos in particular objected to passage of this Act. Senators Anderson and Montoya introduced a bill in the 91st Congress to exempt the 19 Indian pueblos of New Mexico from provisions of the Act. (S.211). Legally, Pueblos have usually been considered as distinct from other tribes in history and structure. Felix Cohen devotes a separate chapter to them (Cohen, Handbook of Federal Indian Law, Chapter 20, Pueblos of New Mexico). Probably the most vivid explanation of the interaction of these courts with the social and religious life of the Pueblo occurs in the fictional account The Man Who Killed the Deer by Frank Waters, Farrar, Rinehart, N. Y. 1941, a thinly disguised portrayal of the Taos Pueblo. There have been departures from the traditional form: four Pueblos now have constitutions and the Zuni has a law and order code. (Cf. 2 Justice and the American Indian, 25.)

B. Courts of Indian Offenses

"Courts of Indian Offenses" are federally-established pursuant to 25 U.S.C. § 2, the statute passed in 1883 which defines the broad power of the Commissioner of Indian Affairs over "the management of all Indian relations." The Courts of Indian Offenses are presently regulated by the Code of Federal Regulations[11] and thus are sometimes referred to as "C.F.R. courts." Appropriations for Courts of Indian Offenses come from the federal government through the Bureau of Indian Affairs.[12]

The 25 C.F.R. Section 11 provisions are not mandatory upon a Court of Indian Offenses; they may be vastly modified and supplemented by the tribal council, with approval of the Secretary of Interior. Section 11(e) provides:

> Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior, they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

C. Tribal Courts

The vast majority of Indian courts are "tribal courts," a legal nomenclature which unfortunately is somewhat confusing, for all Indian courts are in a sense tribal. Tribal courts are those courts established and operated by Indian tribes in the exercise of their sovereign authority, pursuant to written tribal constitutions. These constitutions were passed pursuant to the Indian Reorganization Act (also referred to as the Wheeler-Howard Act) of June 18, 1934, which permitted tribes to "adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe or of the adult

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[11] 25 C.F.R. §§ 11 et seq. (1957).

[12] 25 U.S.C. § 13 specifically authorizes appropriations to Indian judges and Indian police. The legality of the establishment of the Courts of Indian Offenses by the Bureau was upheld as early as 1888 in United States v. Clapox, 35 F. 575 (D. Ore. 1888).

Indians residing on such reservation at a special election authorized by the Secretary of the Interior . . ."[13]

The breakdown of tribal courts, Courts of Indian Offenses, and traditional courts is: 51 tribal courts, 19 Courts of Indian Offenses, and 18 traditional courts.[14] However, in practice this distinction is somewhat misleading: it has been estimated that fully two-thirds of the written tribal codes closely track the provisions contained in the Code of Federal Regulations.

Code of Federal Regulations

The term "Court of Indian Offenses" is a misnomer. In fact, the Code of Federal Regulations has civil as well as criminal provisions and Courts of Indian Offenses may and do handle civil matters.[15] The civil provisions in the Code, however, are very limited. Insofar as they touch upon child welfare matters, the civil provisions include required recording of marriages and divorces within 3 months with the Bureau,[16] tribal council authority to determine if tribal custom marriage and divorce will be recognized[17] and the right of the Court of Indian Offenses to determine paternity and support.[18]

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[13]Sec. 16, 25 U.S.C. § 476. This is not to suggest that prior to the Wheeler-Howard Act tribes did not have written constitutions. Many did. (Cf. Cohen, 128-129.)

[14]2, Justice and the American Indian, 28. This estimate conflicts with that of the Indian Civil Rights Task Force of 65 tribal and traditional courts and 20 Courts of Indian Offenses. Status Report of Indian Civil Task Force, March 8, 1973, Committee on Appropriations, U. S. Senate, 92nd Cong. 2d Sess., Fiscal Year 1973, p. 1905. The Department of Interior states that Courts of Indian Offenses exist on some reservations in Arizona, Michigan, Minnesota, Nebraska, Nevada, South Dakota, Utah, Washington and Wyoming (40 Fed. Reg. 16689, (1975)).

[15]25 C.F.R. §§ 11.22, 11.22C, 11.22CA.

[16]25 C.F.R. § 11.27.

[17]25 C.F.R. § 11.28.

[18]25 C.F.R. § 11.30CA.

In addition, a number of the criminal sentencing provisions are applicable to child welfare matters: whenever an Indian under the age of 18 is accused of a criminal offense, the judge may in his discretion "hear and determine the case in private and in an informal manner and if the accused is found to be guilty, may . . . place such delinquent for a designated period under the supervision of a responsible person selected by him or may take such other action as he may deem advisable.[19] In failure-to-support situations, the Court may order and compel payment of alimony awarded in any state court having jurisdiction,[20] and it may punish failure to support by 3 months labor.[21]

A revised model code was recently prepared pursuant to Title III of the 1968 Civil Rights Act and published for comment in the federal register on April 14, 1975.[22] It seeks to incorporate into the Code the individual rights newly guaranteed by the 1968 Act. The revision, however, only applies to criminal procedure. As noted by the Solicitor of the Department of Interior in proposing the code:

> No substantive civil or criminal code, code of civil procedure, or code of administrative practice will be proposed. The Senate Committee on the Judiciary (which is the Congressional committee which initiated this Act) will be advised of the fact that while the Act requires only a criminal procedure code, only a few cases brought by Indians under the Act have been based on violations of rights in criminal matters--nearly all the decided cases have involved civil matters.[23]

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[19] 25 C.F.R. § 11.36, 11.36C.

[20] 25 C.F.R. § 11.64C(b).

[21] 25 C.F.R. §§ 11.64, 11.64C(a). This last is an example of the antiquated aspects of the present Code, rarely if ever enforced, and of doubtful legality in light of the Indian Civil Rights Act. Another example is making it a criminal offense to give venereal disease to another which is punishable by hard labor (25 C.F.R. §§ 11.63, 11.63C, 11.63CA).

[22] 40 Fed. Reg. 16689.

[23] 40 Fed. Reg. 16690.

The proposed criminal revision, therefore, has bearing only by way of analogy to civil procedures and to child welfare cases coming before an Indian court.

Tribal Codes

In practice, Indian codes are as varied as the tribes which have given rise to them, either in Court of Indian Offenses with C.F.R. Codes supplemented by the tribe or in traditional tribal courts. Thus, the Navajo tribe with 130,000 people on the Reservation has numerous courts and well-developed civil and criminal codes, which include regulation of adoption and termination of parental rights, while the Zuni reservation, thirty miles distant, comprising approximately 3,000 Pueblo Indians, only recently adopted a law and order code and has no written civil code.[24]

How an Indian code deals with adjudications that touch upon child welfare matters such as determinations of neglect and dependency cannot be determined on the basis of whether the court is tribal or of Indian Offenses. A Court of Indian Offenses may have vastly supplemented the meager civil provisions in the Code of Federal Regulations to fully cover matters related to child welfare while a tribal court may have entirely neglected to pass a civil code which deals with these matters; or vice-versa.

Tribal codes as a group are notoriously difficult to locate for research, information or comparative purposes. No one agency has compiled them on an up-to-date basis, at least for purposes of public access, and there is no published compilation of them. This problem exists on a regional level as well. One researcher writing in 1972 about tribal courts of the seven Indian reservations in Montana commented with some frustration:

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[24]Telephone interview with Bruce Boynton, Director, Zuni Legal Aid and Defender Society, Jan. 4, 1975.

[25]Neither the National Indian Law Library in Boulder nor the American Indian Law Center of the University of New Mexico has such a collection. The Indian Civil Rights Task Force, while implying that it has examined all the tribal codes, has not made them publicly available.

> Information as to the . . . present practices and procedures of the tribal courts in Montana is available through contact with the Bureau of Indian Affairs, Washington, D. C. or the Bureau's area office located in Billings, Montana . . . . Unfortunately, as this author found, even the BIA does not always have adequate and up-to-date information in this area. In the absence of the publication of an authoritative and a thorough study detailing this information, verification of much of this information can only be accomplished by personal visit with the tribal officials.[26]

Tribal codes for the reservations involved in this study, for example, were generally obtained through the field research staff and as a result of personal visits with tribal or Bureau officials on the reservations.

The rapid change, brought about by a variety of factors, now occuring in Indian law and the impact of the 1968 Indian Civil Rights Act are likely to bring frequent changes in tribal codes and tribal court practices. Under the severe limitations of the present system for obtaining tribal codes, these changes will make it all the more difficult to obtain up-to-date versions of them.

Practical Aspects of Indian Courts

The reality of how Indian courts work may not be readily apparent from legal research materials, such as C.F.R. or the tribal code. Whereas generalizations are always difficult to come by and subject to numerous exceptions in speaking of Indian courts, some have been attempted in this section in order to clarify the nature of these courts.

These generalizations will serve to highlight an inherent problem, whose solution ultimately lies in the age-old remedies of time and money, namely that Indian courts are required to handle a panoply of civil and criminal problems with severely limited resources. As expressed by one commentator:

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[26]Parker, State and Tribal Courts in Montana 33 Mont. L. Rev. 277 (1972).

> In a very practical sense, the tribal courts are facing real difficulties in coping with the scope of issues the federal courts have recently defined as being within their jurisdiction. That is, while they have been accustomed to operating with procedures and practices comparable to a justice of the peace court on a state level, they have the responsibility to exercise authority comparable in many ways to a state or federal district court.[27]

The "justice of the peace court" analogy is for many reasons an appropriate one. Often, in dealing with the complex legal issues of defining tribal sovereignty or tribal jurisdiction, one tends to forget that the reservation community in question may number only 3,000 persons living in a rural setting. More often than not, the members of that community are impoverished and the resources of the tribal government limited. The formal educational attainments of those members are also limited.[28] None of these factors would be surprising in any small rural community. In Indian communities, an obvious added factor is that the cultural heritage from which the Indian derives is markedly different from that of the predominant society. Given this background, the following physical description of an Indian Court is perfectly consistent:

> The judges do not have private office space at the Tribal jail where the court is located. The courtroom, at the time the author saw it, was a large room totally without furniture except for a permanent desk for the judge on a slightly raised platform in the corner of the room.[29]

With this introduction, the following generalizations may help to clarify matters:

A. Indian Judges are Rarely Lawyers

The requirements for being a judge in an Indian court are generally not extensive. The newly proposed Model Code only states:

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[27]Parker, State and Tribal Courts in Montana, 33 Mont. L. Rev. 277, 286 (1972).

[28]For example, the present chairman of the Navajo Tribe, Peter McDonald, is the first one to have a college education.

[29]Joseph Mudd, Indian Juveniles and Legislative Delinquency in Montana, 33 Mont. L. Rev. 233, fn. 85 (1972).

> Sec. 129(a): No person shall be eligible to serve as a judge of the Court of Indian Offenses if: (1) He or she has ever been convicted of a felony; or (2) has been convicted within one year previous to assuming office.[30]

Comments on qualifications for a tribal judge appear in the Model Code recommendations, as follows:

> Review of tribal codes discloses that many tribes track the Code of Federal Regulation provisions on judicial qualifications; others contain more restrictions as to education, character, age, or training. Still others do not state any qualifications at all, leaving it to the tribal council or the election process to select qualified judges.
>
> . . . Tribal diversity makes it impracticable to set forth . . . detailed requirements for all Indian courts. For example, lack of a high school diploma is not uncommon among the older members of the Indian community. Thus a requirement involving formal educational attainment might well bar a highly qualified candidate. One of the most highly respected judges in the National American Indian Court Judges Association could not meet such an educational requirement.[31]

Similar remarks have been made by other commentators. For example, Alan Parker observes for Montana:

> Generally, the judges are highly respected members of the tribal community but with little or no legal background. On the whole this writer has also found that they possess a deep understanding of their own people and appreciation of their distinctive needs in the administration of a judicial system within the tribal society.[32]

B. Tribal Courts are Courts of Limited Record

Tribal Courts are often courts of limited record. Sometimes, state courts that receive tribal court records only receive a simple form without pleadings filed or a written record of findings of law and fact.[33] The tribal court's

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[30] 40 Fed. Reg. 16689, 16702 (1975).

[31] 40 Fed. Reg. 16689, 16703 (1975).

[32] Parker, State and Tribal Courts in Montana, 33 Mont. L. Rev. 277, 285 (1972).

[33] Ibid., 282.

> file generally will contain a complaint on a standard court form, sometimes a written answer, and findings and judgment. For example, the Flathead Tribal court (in 1972) had its proceedings in a bound minute book with each action described in a short paragraph.[34] Other tribes have tape recorded sessions or more complete record keeping procedures. The proposed Model Code contains warrant, summons, subpoena and judgment forms but has no requirement for record keeping.

C. Due Process

Aspects of due process that exist in state or federal courts, and rules of evidence, may not exist in tribal court. A defendant, for example, is not entitled to a court appointed attorney, although he is entitled to counsel under the Indian Civil Rights Act. Another example:

> ". . . the judge may play a more direct role in which he himself throughly questions the complaining witness and defendants and allows the jurors (if it is a jury trial) to direct questions themselves. In such a scheme, the counsel or advocate would be permitted to question witnesses only after the court had completed its own examination. Proceeding in this manner might well eliminate the many objections and legal arguments which so characterize trials in American courts, but still guarantee a fair trial."[35]

The Indian Civil Rights Act of 1968

Generally, the sovereignty of an Indian tribe is not subject to qualification in its tribal court jurisdiction or procedure except insofar as limited by express legislation of the federal government. This proposition gave rise in 1883 to the case of Ex Parte Crow Dog,[36] in which the U. S. Supreme Court held that federal courts had no jurisdiction to prosecute an Indian for the murder of another Indian committed on an Indian reservation, such jurisdiction never having been withdrawn from the sovereignty of the tribe. Congress's reaction to this case

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[34] Ibid., 285.

[35] 40 Fed. Reg. 16689, 16699 (1975).

[36] 109 U. S. 556 (1883).

was immediate: within two years, it enacted a law making it a federal crime for one Indian to murder another on an Indian reservation and making federal crimes of six other offenses on reservations.[37] Later, more crimes were added.[38] The Major Crimes Act represented the only exercise of federal plenary power upon tribal civil or criminal jurisdiction for many years.

In contrast, the Bill of Rights, which protects individuals from oppressive actions by the federal government, never has been interpreted as applicable to the actions of Indian tribal government toward individual Indians. The original case for this proposition is Talton v. Mayes,[39] decided by the U. S. Supreme Court in 1883. The question presented in this case was whether the invoking of a five member grand jury of the Cherokee Nation Court to hand down a criminal indictment represented a violation of the Fifth Amendment of the Bill of Rights which requires a grand jury of six members. The Supreme Court held:

> . . . as the powers of the local self-government enjoyed by the Cherokee nation existed prior to the Constitution of the United States, they are not operated upon by the Fifth Amendment, which . . . had for its sole object to control the powers conferred by the Constitution on the National government . . .[40]

U. S. Constitutional amendments which followed the Bill of Rights, most notably the Fourteenth, also do not apply to the actions of Indian tribes toward individual members. These amendments are directed solely toward the protection of individuals from oppressive action of the states.[41] Thus, Indian tribal procedure, whether judicial, executive, or legislative, is not

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[37]Act of March 3, 1885, 23 Stat. 362, 385, 18 U.S.C. 548. The others: rape, manslaughter, assault with intent to kill, arson, burglary, and larceny.

[38]Act of March 4, 1909, Sec. 328, 35 Stat. 1088, 1151 (robbery); Act of June 28, 1932, 47 Stat. 336, 337 (incest).

[39]163 U. S. 376 (1883).

[40]163 U. S. at 384.

[41]The notable exception to this is the 13th Amendment, which includes an absolute prohibition against slavery and does apply to tribes. In re Sah Ouah, 31 F. 327 (D. C. Alaska 1886).

subject to due process or equal protection, to freedom of speech, press or religion or to any of the other civil liberty protections insofar as these liberties are part of the Constitution.[42]

It is this fact which gave rise in 1968 to the Indian Civil Rights Act. By this legislation, the federal government invoked its plenary power to require Indian tribes to adhere to certain federally-imposed civil libertarian standards in governing their members, standards which are similar to those of the Bill of Rights. For example, freedom of speech and press, the free exercise of religion, and the right to assemble peaceably and petition for a redress of grievances are protected;[43] a person is entitled in a tribal criminal proceeding to the assistance of counsel at his own expense, to a speedy and public trial, to have compulsory process for obtaining witnesses in his favor, to be confronted with the witnesses against him, to be informed of the nature and cause of the accusation;[44] an Indian court may not require excessive bail, inflict cruel or unusual punishment, nor impose for any one offense a penalty or punishment greater than imprisonment for six months or a $500 fine or both;[45] a person within the tribe's jurisdiction is entitled to equal protection and due process of law;[46] and a person accused of an offense punishable by imprisonment is entitled, upon request, to a trial by a jury of not less than six person.[47] These examples indicated that the Indian Civil Rights Act closely follows the wording of the protections in the Bill of Rights, and Constitutional Amendments. However, as indicated by the underlining,

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[42]Tribes themselves, of course, could incorporate such provisions in their constitutions and some did, at least partially.

[43]Sec. 202(1).

[44]Sec. 202(6).

[45]Sec. 202(7).

[46]Sec. 202(8).

[47]Sec. 202(10).

there are some notable exceptions.[48] All in all, the Act represents a dramatic exercise of federal plenary power upon the manner in which tribes are permitted to govern on reservations.[49]

It takes decades for a major piece of legislation such as this to be fully interpreted through court cases brought pursuant to it. Just such a process is taking place at the moment, with cases being brought and decided. Two points are becoming clear:

> 1) Apparently, the Act does not require that terms such as due process or equal protection signify the exact same thing as they do under the Constitution. In other words, the Act does not simply incorporate the Bill of Rights or U. S. Constitutional Amendments as interpreted in case law. Rather, the mandate of the Act is for Indian courts to develop concepts such as due process or equal protection as applicable to their unique status--an "Indian due process." Exactly what this means in practice remains to be seen, some federal courts require closer adherence to federal-state standards of due process than others.
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> 2) The Act does not require that three branches of government (legislative, executive and judicial) be established by Indian tribes.

Legal Resources for Reservation Communities

Ten years ago, legal resources for reservation communities were severely limited. Whereas a tribe might have a General Counsel in Washington on retainer, an individual Indian in a reservation community confronted by a legal problem, and unable to afford legal expenses, had little chance of obtaining professional assistance. Further, there were few national legal organizations devoted to the protection of Indian rights,[50] no Indian law report to compile current judicial and administrative cases, no up-to-date Indian law library readily accessible to the public, few Native Americans trained as lawyers, and no national tribal judges association.

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[48]It should be noted that no grand jury of six or more is required for the issuance of indictments by the Indian Civil Rights Act. Thus Talton v. Mayes still stands as the law applicable to that particular situation.

[49]The Act was opposed for this reason by many tribes.

[50]The most notable exception to this was the American Association of Indian Affairs.

All of this has since changed. By 1973, the Office of Economic Opportunity's Indian Legal Services Program had acquired an annual budget of 1.8 million dollars. In 1971, the Native American Rights Fund was established, a Ford Foundation project in Boulder, Colorado, employing attorneys to act as a central legal resource for communities and legal services organizations, and to bring test cases.[51] In 1972, the National Indian Law Library was also established at Boulder through a $119,000 Carnegie Foundation grant; it is the first public access library to catalogue all available Indian legal materials on an on-going basis. In 1974, 144 Indian students were in law school; and there were approximately 180 Indian attorneys in the country, 40 of whom had graduated the previous year. Of these 180, between 150 and 160 had passed a state bar examination.[52] In 1969, the National American Indian Court Judges Association was incorporated and in 1970 the Association undertook the establishment of a training program for all Indian court judges who cared to participate.[53] In 1974, the Indian Law Reporter was established--a monthly publication of the American Indian Lawyer's Training Program, and the first Indian law reporter;[54] it is cross-referenced to the National Indian Law Library. In 1974, Congress finally appropriated money pursuant to the Indian Civil Rights Act of 1968 to publish a compilation of all Solicitor's Opinions, published and unpublished, from 1917 on, as well as an up-to-date version of all statutes,

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[51]Incorporated July 1971. In October 1971, Ford Foundation made its largest single grant for Indians to NARF: 1.2 million over a three-year period.

[52]Testimony of Commissioner Thompson, April 4, 1974, HR 16027, Senate Appropriations Subcommittee, 93rd Congress, 2d Sess., p. 1327.

[53]Funded by Law Enforcement Assistance Agency and the Bureau of Indian Affairs. Cf. 40 F.R. 16703.

[54]Funds for development of the Reporter came from two private foundations: the Donner Foundation and Akbar Fund.

executive orders and proclamations from June 1938 through 1970.[55] The rapidity with which the field of Indian law has recently been advancing--from relative obscurity previously--is attributable in terms of federal legislation to two acts: The Economic Opportunity Act of 1964 and the Indian Civil Rights Act of 1968. The Economic Opportunity Act created federally funded legal services organizations and placed them on or near Indian Reservations. As a result, indigent Indians on reservations large and small were for the first time provided with legal assistance. The results were dramatic: many of the key recent cases discussed in this report were brought by legal services organizations; back-up legal resources, such as NARF, were a direct outgrowth of a need perceived by legal services attorneys; legal services organizations included funding for tribal lay advocates in tribal court, and the continuing interaction of these advocates with tribal courts, both as advocates and legal consultants, improved court procedure. These organizations sometimes proved quite powerful: the largest of them, DNA, operating in the Navajo Reservation had 17 attorneys and 28 Navajo lay advocates in 1970, has since added two more offices, and is funded at well over a million dollars annually.[56]

In 1968, the Indian Civil Rights Act was passed, and in its wake, numerous Court cases have arisen, constantly testing the meaning of the Act and reshaping tribal court procedure. The Act has also served to focus greater attention upon Indian law itself and thus channel more money into Indian legal institutions. Unfortunately, Congress neglected to make appropriations pursuant to the Act to tribal courts so that they might institute the new

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[55] S. 969, Act of April 12, 1974; 88 Stat. 84; Pub. L. #93-265.

[56] Cf. Indian Legal Services Programs: The Key to Red Power: 12 Ariz. L. Rev. 594, 611-623 (1970).

procedures, a legislative oversight whose repercussions are still being felt.

All of the factors discussed above are important to keep in mind in assessing child welfare service delivery on Indian reservations. They presage an eventual upheaval in the landscape of tribal court procedure and will undoubtably serve to make that procedure more sophisticated in a legal sense and less subject to disregard by state judicial, administrative or legislative agencies.

III. THE CURRENT STRUCTURE OF CHILD WELFARE PROGRAMS.

Thus far we have discussed the history and background of the law generally applicable to Indians, and the development and present status of internal Indian law. Before exploring the specific legal/jurisdictional problems involved in the delivery of certain child welfare programs to Indians, it is first necessary to examine in some detail the general statutory authority, administrative regulations, case law, and related political considerations for these programs.

Administrative Structure of SRS. The major federal involvement in the child welfare area is through programs of the Social and Rehabilitation Service (SRS) of the United States Department of Health, Education and Welfare (HEW). The basic statutory authority for these programs is the Social Security Act.

The specific statutory authority for the SRS child welfare programs is principally Title IV of the Social Security Act, and Title IV is subdivided into parts A through D.[1] The Title IV-A programs provide aid to families with dependent children (AFDC). This aid consists both of financial assistance to these families (including to foster parents) and social services. Generally, AFDC is available only to low-income people who can establish that their income and resources are insufficient to meet their financial needs. In contrast, Title IV-B programs provide child welfare services to persons regardless of their income and resources, although low-income persons are to be given priority for these services. Title IV-C establishes the authority for work incentive programs (WIN) for AFDC recipients, and is therefore tied into the Title IV-A program. These programs encompass the specific types of child-welfare assistance and services covered in this study.

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[1] Title IV-D is not directly relevant to this study.

It should be noted here that on October 1, 1975, a new federal statute, Title XX of the Social Security Act, will replace the Title IV-A services but not direct financial assistance programs for recipients of AFDC. It does not appear that Title IV-B will be materially affected. This new Title XX program, and the changes that will result in existing SRS child-welfare services, will be discussed at greater length in Section V, below.

Underlying all of the SRS child welfare programs is the concept known as "cooperative federalism." In essence, this means that the funding and administration of these programs are respectively handled on a cooperative basis by the two major types of governmental entities in the American federal system, the federal government and the various state governments.[2] For each major program, the federal government provides financial assistance to those states that agree to participate by submitting state plans which conform to federal statutory requirements.

The amount of federal financial assistance--also called the federal matching grant--varies from program to program. In the child welfare area, the federal financial assistance for services, other than those directly related to the AFDC/WIN program, are subject to a federal limit on expenditures, and the maximum federal grant to each participating state is a proportion of this limit based in part on the population of that state.[3] Within these maximum aggregate federal grant limits, certain state programs will be reimbursed on the basis of the total expenditures by the state.[4] Services under the AFDC/WIN (Aid for Families with Dependent Children/Work Incentive) program,[5] and assistance payments

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[2] In some states, county governments are involved in the day-to-day administration of these programs as part of a state-wide system. This fact, the result of state governmental decision, does not affect the basic cooperative federalism arrangement between the federal and state levels of government.

[3] 42 U.S.C. §§ 621 (calculation also involves the per capita income of the state), 1320b(b), 2002(a)(2)(B).

[4] 42 U.S.C. §§ 603(a)(3), 2000(a)(1).

[5] 42 U.S.C. § 631(c)(2).

under the AFDC program,[6] receive federal financial assistance based on the number of recipients of these programs.

The amount of federal assistance available to the states varies considerably from program to program. Under the Title IV-B Child Welfare Services program, in which eligibility for a categorical aid program such as AFDC is not a factor, the federal limit on expenditures for the fiscal year ending June 30, 1976, is $246 million.[7] The federal grant limit for Title IV-A (AFDC) and other services is $2.5 billion.[8] Therefore a considerably larger amount of federal financial assistance is available for the state for social services for AFDC (Title IV-A) recipients than under the Title IV-B program.[9]

One important aspect of these programs is that those states which elect to participate in them by submitting state plans must comply with federal program requirements established by statute and regulations. In numerous cases, such as King v. Smith,[10] Townsend v. Swank,[11] and Carleson v. Remillard,[12] the courts have held that a state may not exclude from AFDC benefits a class of potential recipients who are eligible under federal AFDC standards.

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[6] 42 U.S.C. § 603(a)(1).

[7] 42 U.S.C. § 620.

[8] 42 U.S.C. §§ 1320b(b), 2002(a)(2)(A).

[9] The actual difference is greater than these statistics indicate. For the fiscal year ending June 30, 1975, only $50 million (not $246 million) was appropriated for Title IV-B child-welfare services. 1974 U. S. Code Cong. & Admin. News 6596. The federal share of Title IV-A AFDC services for the same fiscal year was $1,336 billion. FY-76 DHEW Budget, at 435. (The full $2.5 billion was not spent partly because many states did not use the full amount of federal funds to which they were entitled.) Thus the ratio of federal assistance for Title IV-A services to federal assistance for Title IV-B services is approximately 27:1.

[10] 392 U. S. 309 (1968).

[11] 404 U. S. 282 (1971).

[12] 406 U. S. 598 (1972).

Such unauthorized state exclusion violates the Social Security Act and is invalid under the Federal Supremacy Clause of the United States Constitution. However, the states do have considerable latitude in establishing financial eligibility standards for their programs.

Two important aspects of these programs are the federal "single state agency" and "statewideness" requirements. For Title IV-A AFDC assistance and services programs (including AFDC/WIN day care), there is the following statutory requirement:

> (a) A state plan for aid and services to needy families with children must--
>
> (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single state agency to supervise the administration of the plan.[13]

The regulations,[14] implementing this statutory provision do not elaborate on this requirement, except insofar as concerns the relationship of the Title IV-A single state agency to other public and private agencies. These regulations are discussed more fully later in this section dealing with the contracts by this state agency with other organizations to provide services.

The single state agency requirement for the Title IV Child Welfare Services program provides:

> (a) From the sums appropriated therefor and the allotment available under this part, the Secretary shall from time to time pay to each State--
>
> (1) that has a plan for child-welfare services which has been developed as provided in this part and which --
>
> (A) provides that (i) the State agency designated pursuant to [42 U.S.C. § 602(a)(3)] to administer or supervise the administration of the plan of the State approved under part A of this title [IV] will administer or supervise the administration of such plan for child-welfare services . . . .[15]

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[13] Set forth in 42 U.S.C. § 602(a)(3).

[14] 45 C.F.R. § 205.100 (1974).

[15] Contained in 42 U.S.C. § 622(a)(1)(A).

While the statute appears to require that the same state agency administer or supervise the administration of both the Title IV-A and the Title IV-B programs, the regulations [16] permit the state to have a different agency in charge of each of these programs if such was the case on January 2, 1968. Otherwise, the regulations do not materially add to the Title IV-A statutory single state agency requirement.

The "statewideness" requirement for Title IV-A provides:

> (a) A state plan for aid and services to needy families with children must--
> (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them.[17]

The regulations further provided that the statewide operation of the state plan shall be accomplished through a "system of local offices," all of which shall be continuously informed of state "policies, standards, procedures and instructions, with monitoring of local operations by regularly assigned state staff."[18] The apparent purpose of these regulations is that each state's Title IV-A program be administered uniformly, so that the same level of assistance and services is available throughout the state.

In contrast, the Title IV-B "statewideness" requirement permits each state to have internal geographic variations in the provision of services. The specific statutory language[19] authorizes the Secretary of Health, Education and Welfare to give financial assistance to each state

> (2) that makes a satisfactory showing that the state is extending the provision of child-welfare services in the State, with priority being given to communities with the greatest need for such services after giving consideration to their relative financial need, and with a view to making available by July 1, 1975, in all political subdivisions of the State, for all children in need thereof, child-welfare services provided by the Staff . . .

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[16] 45 C.F.R. § 220.49(a)(ii)(a,b).

[17] 42 U.S.C. § 602(a)(1).

[18] 45 C.F.R. § 205.120 (1974).

[19] 42 U.S.C. § 622(a)(2).

> of the State public welfare agency or of the local agency participating in the administration of the plan in the political subdivision.

There are two significant ways in which this differs from the Title IV-A statewideness requirement. First, until July 1, 1975, the participating states are not really required to have their child-welfare program with statewide scope, merely to satisfactorily show that they are extending these programs in this direction. This is supposed to evolve into a statewide system in each of these states, no later than July 1, 1975. If the statutory language ("with a view to making available . . . in all political subdivisions of the State") is not clear enough, the regulations[20] flatly state that each participating state will make child-welfare services "available in all political subdivisions by July 1, 1975, for all children in need of them." Second, a state may give priority to communities with the greatest need for these services "after giving consideration to their relative financial need." According to 45 C.F.R. § 220.40(b)(1), "there will be a reasonable and objective method for assessing this need" for child-welfare services.

There is another "statewideness" requirement for the AFDC/WIN program, contained in Title IV-C of the Social Security Act. The statute provides:

> The Secretary of Labor . . . shall, in accordance with the provisions of this part, establish work incentive programs . . . in each State and in each political subdivision of a State in which he determines there is a significant number of individuals who have attained age 16 and are receiving aid to families with dependent children. In other political subdivisions, he shall use his best efforts to provide such programs either within such subdivisions or through the provision of transportation for such persons to political subdivisions of the State in which such programs are established.[21]

Here there is a federally-determined allocation of resources, in which some communities might not have any involvement with the AFDC/WIN program because of an insufficient number of AFDC recipients over

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[20] 45 C.F.R. § 220.40(a)(1974).

[21] 42 U.S.C. § 632(a).

the age of sixteen.

HEW-SRS Enforcement Power

The question of federal enforcement powers frequently arises: How does HEW enforce that plan so that States do not, either through state regulation or administratively, violate the federal provisions. The first power the Secretary of HEW has with reference to Title IV-A programs is to simply refuse to approve any plan which does not fulfill the conditions of 42 U.S.C. § 602(a). This section includes the requirement that a state plan must "provide that it shall be in effect in all political subdivisions of the State . . . "[22]

The second power the Secretary has is one of review of compliance with a state plan he has already approved. He does this by holding what is termed a "compliance hearing." If, "after reasonable notice and opportunity for hearing to the state agency administering or supervising the administration of such plan," the Secretary then finds that "in the administration of the plan there is a failure to comply substantially with any provision required by section 402(a)"[23] he may take corrective action.[24]

This corrective action includes notification to the state agency that further payments will not be made to the state, or in the Secretary's discretion, that payments will be limited to categories under part or parts of the state plan not affected by such failure until the state complies. In other words, if the Secretary were to find, for example, that the state was refusing AFDC foster care payments to eligible individuals, he could, at his option, discontinue Title IV-A foster care payments to the state or discontinue

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[22] 42 U.S.C. § 602(a)(1).

[23] 42 U.S.C. § 602(a).

[24] 42 U.S.C. § 604(a), 604(a)(2).

all payments whatsoever under Title IV-A to the state.[25]

Title IV-B is covered by the conformity hearing provisions[26] but only insofar as such child welfare services apply to AFDC families. Thus, theoretically, the failure to provide child welfare services to AFDC children could result in the cut off of funds of all Title IV-A assistance to a state. However, Title IV-B services to non-AFDC families are not subject to conformity hearings, although--of course--the Secretary has the option of not approving a proposed state plan which does not meet the Title IV-B requirements. Since Title IV-B does not, as of the moment, have provisions for equal distribution of services throughout the political subdivisions of a state, the matter of a state's failure to provide equal services on a statewide basis is less likely to trigger formal conformity hearings.

Once HEW has decided, after hearing, to discontinue a state's funds under part or all of Title IV-A,[27] the state may file a petition for a review of the decision in the appropriate federal court of appeals. The statute states, in relevant part:

> (3) Any state which is dissatisfied with . . . a final determination of the Secretary under section . . . 604 . . . of this title may, within 60 days after it has been notified of such determination, file with the United States court of appeals for the circuit in which such

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[25] In addition to the "big gun" of these provisions, a few "small guns" exist. For example, federal aid to a state under the WIN program may in some instances be reduced a percentage point. (42 U.S.C. § 603(c)). Failure to inform all AFDC families of child health screening services will result in a one percentum reduction (42 U.S.C. § 603(g)). Failure to provide family planning services to AFDC families will result in a one percentum reduction to the state. (42 U.S.C. § 603(f)). Lastly, failure to provide a "single organizational unit" within the state agency, and local agency administering the state plan, to furnish child welfare services or family planning services will result in a one percentum reduction. (42 U.S.C. §§ 603(f)(2) and 602(a)(15)(B)).

[26] 42 U.S.C. § 604(a)(2); 42 U.S.C. § 602(a) which incorporates 42 U.S.C. § 625, Child Welfare Services, at § 602(a)(14).

[27] 45 C.F.R. 201.6.

state is located a petition for review of such determination.

. . .

(5) The court shall have jurisdiction to affirm the action of the Secretary, or to set it aside, in whole or in part . . . .[28]

In practice, HEW has seldom formally challenged the compliance of a state welfare plan with the terms of the Social Security Act.[29] This characteristic of HEW's actions has been attributed to various factors: a stated preference for negotiation,[30] fear of the damaging economic consequences to recipients of the cutting-off of funds,[31] and fear of the political consequences.[32] Regardless of the reason, certain factors lie beneath the statutory scheme which undoubtedly do influence the enforcement of the Act. The most obvious is the practical difficulty with the theory that the states are free to take or leave the Title IV programs as they see fit. In point of fact, "Alabama, together with every other state, Puerto Rico, the Virgin Islands, the District of Columbia,

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[28] 42 U.S.C. § 1316(a).

[29] See, Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84, 91 (1967); Note, Welfare's "Condition X," Yale L. J. 1220 (1967), n. 7; Dandridge v. Williams, 397 U. S. 505, 509 (1970).

[30] The General Counsel to HEW in 1969 stated:

> To date this department has initiated conformity hearings in connection with the state plans of Nevada and Connecticut. In view of the fact that the imposition of sanctions against states which are found to be out of conformity are mandatory, we exert every effort to bring a state into conformity without the necessity of a formal hearing. (Cited in Rosado v. Wyman, 397 U. S. 427, 431 (1970)).

[31] Bryant v. Carleson, 444 F.2d 353, 360 (9th Cir. 1971).

[32] One commentator suggests that HEW has acted politically. " . . . Thus, HEW did not invalidate Louisiana's "unsuitable home" plan outright, but instead issued a prospective ruling because President Eisenhower did not want to hurt Republican chances in the 1960 election. The Michigan plan was struck down because President Kennedy did not mind giving George Romney a hard time." Steiner, Social Insecurity, 100, 101-107 (1966): Note, Welfare's "Condition X," 76 Yale L. J. 1220, 1223, n. 7 (1967).

participates in the Federal Government's Aid to Families With Dependent Children (AFDC) program, . . ."[33] The program has become so much a part and parcel of every State's social welfare policy, that strict enforcement of the provisions by the federal government would clearly expose the practical weaknesses of the "take-it or leave-it" rationale. Further, the "big gun" of cutting off federal assistance to all recipients of a certain class in a state as a way of gaining compliance clearly has certain drawbacks. Congress itself, in the legislative history preceding passage of Title XX, finally acknowledged the difficulties of gaining state compliance under the present system and determined to concentrate upon procedural compliance based upon citizen participation rather than substantive compliance.[34]

As it affects Indians, HEW has on a few occasions challenged the compliance of a state welfare plan with the terms of the Social Security Act. In 1954, HEW's predecessor, the Federal Security Administration, refused to approve an Arizona State plan which discriminated against Indians.[35] More recently in 1971, a conformity hearing was held on four of Arizona's public assistance plans (OAA; AFDC and CWS; AB and APTD) in which Arizona was found out of compliance.[36] A number of Arizona's failures impinged particularly upon Indian recipients.[37] It was recently noted by HEW Region IX (as the result of information submitted by Arizona in the Navajo Social Services Project 1115 proposal) that Arizona has been consistently following apolicy over the years of not supplying AFDC child welfare services to Indian reservations.

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[33] King v. Smith, 392 U. S. 309, 311 (1968).

[34] See 1974 U. S. Code Cong. & Admin. News 9193, 9198.

[35] Arizona v. Hobby, 221 F.2d 498 (D. C. Cir. 1954).

[36] Ariz. Dep't. of Pub. Welfare v. Dep't of HEW (449 F.2d 456 (9th Cir. 1971).

[37] Failure to establish state level advisory committees for AFDC and CWS under 45 C.F.R. §§ 220 et seq.; failure to provide assistance fully to AFDC families of children and relatives. DNA Inc., the Navajo OEO legal services program, was a participant in the hearings.

To demonstrate the difficulties with enforcement processes, we note that at no time during the controversy which erupted in the State of North Dakota concerning the state's refusal to extend Title IV-A child welfare services to Indian reservations did HEW formally commence a conformity hearing, nor formally give notice that the state plan would not be approved. Instead, a series of attempts to induce compliance by the state were made, with the most pointed effort that of requiring the state to pay AFDC foster care costs without federal matching to foster care homes on Indian reservations which the state would neither license nor approve.

There are added complications with HEW compliance proceedings for Indian reservations. In addition to the great difficulties of employing the big gun of the cut-off of state funds, the unique legal problems involved in delivering assistance and service to recipients governed by the additional layer of government--the Indian tribes--adds to the problems of proceeding against a non-complying state. The jurisdictional and legal problems pertaining to Indian reservations are not readily amenable to a universal federal solution: each state and each Indian reservation within a state must be studied separately. Additionally, internal Indian law is notoriously difficult to pin down in areas such as specifying those Indian tribal powers which are inherent attributes of government and therefore cannot be infringed upon by the states (the Williams v. Lee "test") and in determining the effect of a tribal court order off the reservation.

Added to this confusing situation is the position adopted by the Bureau of Indian Affairs. Legally, the Social Security Act and Title IV-A assistance and services appear to apply to Indian reservations to the exclusion of the Bureau's programs. However, faced with the urgently demonstrated need for services on reservations, the Bureau has stepped forward to fill the gaps in assistance and services when a state puts up enough resistance to its delivery of these programs. As a result, there is in practice a continual

tension established: the state desiring the Bureau to pick up state programs; and the Indian tribes often feeling more comfortable with federal, rather than state, control over their programs.

Lastly, as presently established, the system must rely upon agreements between the state and the Bureau or the state and tribal government for the full delivery of child welfare assistance and services. No mandatory procedure exists to facilitate the making of such agreements. Needless to say, it is as a legal proposition very difficult without the procedural foundation to compel a state to enter into such agreements.

"Class Action" Enforcement

There is an additional mechanism for raising the question of inadequate delivery of services. Conformity hearings may only be initiated by the Secretary of HEW.[38] While third parties as of July 29, 1970, are permitted to intervene at these hearings,[39] they may not introduce additional issues.[40] Nor may they appeal the decision of the Secretary to the United States court of appeals; that is a right reserved to the State.[41] They may, on the other hand, obtain review of the Secretary's decision in district court.[42]

However, the most effective legal instrument by far in the hands of welfare recipients has proved to be "class action" suits. Such suits, usually brought by legal services organizations, involve individual recipients who represent a "class" of persons affected similarly by a federal or state statute, regulation or administrative

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[38] U.S.C. § 604(a).

[39] 45 C.F.R. § 213.15. These regulations were promulgated in response to NWRO v. Finch, 429 F.2d 725 (D.C. Cir. 1970).

[40] 45 C.F.R. § 213.14(d).

[41] 42 U.S.C. § 1316(a) Arizona Dep't. of Pub. Welfare v. DHEW, 449 F.2d 456, 462-463 (1971).

[42] Cf. NWRO v. Finch, 429 F.2d 725, 736 (D. C. Cir. 1970) (quoting Judge Lumbard's concurring opinion in Rosado v. Wyman, 414 F.2d 170, 181 (2d Cir. 1969), rev'd on other grounds, 397 U. S. 397 (1970); Rettinger v. FTC, 392 F.2d 454, 457 (2d Cir. 1968).

practice. The suit represents a direct judicial attack upon the regulation or practice in question as violative of the Equal Protection Clause of the Supremacy Clause of the U. S. Constitution or Title VI of the 1964 Civil Rights Act; and thus this mode of legal attack has been a favorite among minority group welfare recipients adversely affected by welfare rules.

There are distinct disadvantages to such a means of enforcement:

> The applicant whom the state declares ineligible will be reluctant and ill-equipped to attack the substantive provisions of the program; despite legal aid, the very poor still find private actions too difficult and time-consuming to pursue, especially where the state is the adversary. A lawsuit if begun becomes moot when the complainant moves or gets a job, or when the state, fearing an adverse outcome, suddenly reverses itself and admits the plaintiff to the welfare rolls. The court may decide for the plaintiff but on a technical basis, pertinent only to the claim under dispute rather than to the substantive issues. Years may pass before a court passes on the validity of the state program.[43]

Despite these very definite drawbacks, the class action suit, particularly in the period of time from 1968 through 1972, was the vehicle for challenging certain aspects of the welfare system in dramatic ways with reference to state encroachments upon federal eligibility requirements. The suits were the spearhead in the development of the emergent field of "welfare law," and their success lay in numerous favorable decisions by the United States Supreme Court. It is fair to say that the numerous cases together constitute a major reform of the welfare system, with wide-ranging effects on the overall administration of the welfare system.[44]

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[43] Note, Welfare's "Condition X," 76 Yale L. J. 1222, 1225 (1967).

[44] The cases were: King v. Smith, 392 U. S. 309 (1968) (overturning Alabama's "substituting father" regulation under AFDC); Shapiro v. Thompson, 394 U. S. 618 (1969) (overturning the one year residency requirements of Connecticut, District of Columbia, and Pennsylvania); Goldberg v. Kelly, 397 U. S. 254 (1970), (the classic SSA "due process" case, overturning New York's failure to afford a hearing to a recipient before terminating public assistance payments); Rosado v. Wyman, 397 U. S. 397 (1970) (overturning New

From the viewpoint of the welfare recipient, these suits had distinct advantages as opposed to federal conformity or enforcement proceedings. The suits did not require approval of, or participation by, HEW, and therefore could be initiated with dispatch. If successful at the United States Supreme Court level, they resulted in nation-wide changes in state practices and not just in the particular state in question.[45] They did not, as did the conformity hearings, use as leverage the cut-off of federal funds to additional state welfare recipients. And lastly, they made the Department of HEW considerably more responsive to welfare complaints by potential recipients generally.

However, this additional mechanism to challenge the adequacy of state provision of welfare services or assistance has not been employed very often in major cases by recipients in Indian reservations for discriminatory state practices. The reasons are undoubtedly similar to those of HEW in not pressing for conformity hearings on matters involving Indian reservations. There is another major factor--many Indian tribes desire to control their own programs. It is revealing, for example, that the Navajo Tribe--rather than actively pressing for full state compliance--was willing to contribute the 25% state matching share for control of its own AFDC child welfare services program. Legal Services attorneys

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[44] (Cont.)York's method of determining need for AFDC); Dandridge v. Williams, 397 U. S. 471 (1970) (upholding Maryland's absolute limit of $250 per month of a grant under AFDC); Wyman v. James, 400 U. S. 309 (1971) (upholding N. Y.'s right to condition AFDC eligibility on inspection of home by caseworker). Graham v. Richardson, 403 U. S. 367 (1971), overturned Arizona's and Pennsylvania's residency requirements for aliens. Subsequent cases include: Carleson v. Remillard, 406 U. S. 598 (1972) (overturning California's denial of AFDC to military orphans); Townsend v. Swank, 404 U. S. 282 (1971) overturning Illinois's barring of dependent children 18 through 20 who attend college from AFDC); New York State Dep't. of Social Services v. Dublino, 413 U. S. 405 (1973) (upholding New York's additional registration requirements for participation in the WIN program).

[45] For example the ruling in King v. Smith, 392 U. S. 309 (1968), affected 19 states and the District of Columbia (at 337-338); in Shapiro v. Thompson, 394 U. S. 618 (1969) only 11 jurisdictions were not affected by the overturning of residency requirements (at 639, n. 22).

whose clients are primarily Indian, and who are aware of the many contradictory currents in Indian thought, have been to date less likely to press for full compliance in programs of grant-in-aid welfare assistance and services than they have in other areas.[46]

BIA Administrative Structure. The Bureau of Indian Affairs (BIA) of the United States Department of Interior also administers a program of child-welfare assistance and services. Two major differences between this program and the SRS program just discussed are (1) BIA assistance and services are limited to certain Indians and (2) the basic BIA program is federally administered.

The statutory authority for BIA involvement in welfare programs is the 1921 Snyder Act,[47] which reads in part as follows:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
>
> General support and civilization, including education.
>
> For relief of distress and conservation of health.
>
> . . .
>
> And for general and incidental expenses in connection with the administration of Indian affairs.

As was pointed out by the Supreme Court in Morton v. Ruiz,[48] this is the "underlying congressional authority" for most BIA activities, including those in the welfare area, and was intended to avoid procedural difficulties in the annual Congressional consideration of BIA appropriation requests. The language of the Snyder Act is extemely broad, especially in comparison with the great complexity and specificity of the Social Security Act. It therefore provides the authority for a range of programs and services, the details

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[46] Major successful suits have appeared in other federal aid areas, however. For example, discriminatory use against Indian children of Impact Aid funds, 20 U.S.C.A. § 452) and Title I, Elementary and Secondary Education Act funds (20 U.S.C.A. § 241a) by the Gallup-McKinley School Board in New Mexico, Natonabah v. Board of Education, 355 F. Supp. 716 (1973); suit for discriminatory denial by North Dakota of Indian participation in the Food Stamp Act, settled by state agreement to comply, Decoteau v. Tangedahl, unreported, Civil Action A2-74-33 (D. No. Dak. 1974).

[47] 25 U.S.C. § 13.

[48] 415 U. S. 199 (1974).

presumably to be established in more specific legislation and in regulations.

Another statute bearing on the BIA's activities in this area can be found at 25 U.S.C. §§ 452 et seq. This authorizes the BIA to contract with states or their political subdivisions for social welfare including relief of distress of Indians in such states. This provision is discussed more extensively later in this section.

The regulations for the social welfare program administered directly by the BIA are not located in the Code of Federal Regulations. Instead, they are distributed as part of the Indian Affairs Manual (IAM), a loose-leaf collection of materials that is generally not available in public libraries or even law libraries. This fact was sharply criticized in Morton v. Ruiz,[49] since the general practice for federal regulations "of general or particular applicability and future effect" as mandated by the Administrative Procedure Act, is publication in the Federal Register, which ensures wide circulation, and codification in the Code of Federal Regulations. Despite this criticism, these BIA regulations have not been given this wider circulation.

The BIA welfare program consists of two major components: general assistance and social services. The general assistance program provides financial assistance to Indians living on or near reservations,[50] whether or not they fit into one of the categories of SRS programs, such as being blind, aged, disabled, or a needy family with dependent children. One major eligibility requirement is that public assistance or general assistance from a state or local jurisdiction must be actually unavailable to the BIA general assistance recipient. As spelled out in IAM, this means:

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[49] 415 U. S. 199 (1974).

[50] Before Morton v. Ruiz, 415 U. S. 199 (1974), the BIA limited general assistance to Indians living on reservations. This case held that "unassimilated Indians living in an Indian community near their native reservation, and who maintain close economic and social ties with that reservation" are also eligible for BIA general assistance.

--Recipients of non-BIA public assistance, or persons whose needs are included in a public assistance payment, are not eligible for BIA general assistance;
--Applicants for non-BIA public assistance may be eligible for BIA general assistance during an interim period before receipt of the first non-BIA public assistance check; and
--Applicants for non-BIA public assistance who have made a reasonable effort to comply with the public assistance requirements and meet the eligibility standards, but have not received a prompt determination or fair consideration of their application, may have their BIA general assistance continued pending appeal.[51]

If an Indian is potentially eligible for state assistance but fails to apply or refuses to comply with state assistance regulations, he may be deemed ineligible for BIA general assistance. The BIA program, according to the Manual, is only a resource of last resort.

An applicant for BIA general assistance must also establish financial eligibility for this program. In essence, this means that the applicant's income and resources must be insufficient to meet his or her financial needs, including dependents. In determining the level of the applicant's financial needs, the BIA uses the public assistance standard of the state in which that applicant resides,[52] even though different states may use different standards for this purpose. For determining the applicant's income and resources, however, the BIA uses its own standards.[53]

The BIA also administers a program of social services, including child-welfare services. While there is no financial eligibility standard for BIA social services for children (thus making this program more like Title IV-B than Title IV-A of the Social Security Act), there is an eligibility limitation to Indian children of at least "one-fourth degree Indian blood."[54]

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[51] 66 IAM 3.1.40.

[52] 66 IAM 3.1.7A.

[53] 66 IAM 3.1.7B.

[54] This blood-degree limitation is not contained in the Snyder Act or in any of the appropriations requests within recent years,

As with the BIA general assistance program, there is a policy under the BIA program of social services for children of using state resources before providing services directly. The manual states:

> It is considered that the general welfare of the Indian child is best promoted when necessary social services are received through the appropriate agencies of the state in which he lives.[55]

This policy is implemented in a number of situations: in referrals to state agencies of situations in which "a living arrangement made by a parent or legal guardian [is] seriously detrimental to a child,"[56] referrals to state agencies of cases of children not in the custody of their own parents[57] and in the general proviso that BIA shall provide social services for children "[i]n the absence of other available resources."[58] A variation on this theme is the use of state standards for foster home and foster care, "[i]nsofar as possible."[59]

When the BIA does provide services to Indian children, it does so in a variety of situations: in the child's own home, in a foster home or foster care institution, or in a BIA boarding school. The BIA can also place Indian children in a state other than the one in which they reside; here too the BIA Manual emphasizes working through state agencies, even to the point of seeking to encourage tribal courts "to work through State channels."[60]

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[54](Cont.)and is thus subject to the same kind of attack as was the geographic limitation involved in Morton v. Ruiz, 415 U. S. 199 (1974). Also, there is a geographic limitation for BIA social services programs, similar to that for BIA general assistance, which may also be invalid under the Ruiz guidelines.

[55]66 IAM 3.2.4A

[56]66 IAM 3.2.5C.

[57]66 IAM 3.2.5E(1)(a).

[58]66 IAM 3.2.6.

[59]66 IAM 3.2.6B(3)(d).

[60]66 IAM 3.2.6G.

Case Law: Introduction

A state's failure to provide services, extended to other persons in the state, to residents of Indian reservations naturally raises the question of when and whether such state action conflicts with federal statutes or is unconstitutional. This part of this Section begins with a discussion of the application of general equal protection principles to the delivery of child welfare services to Indian reservations, and then deals with specific principles applicable to certain aspects of this system.

Basic Principles of Equal Protection and Due Process

Under traditional equal protection principles, a state has the right to make classifications as long as those classifications meet what is called "the reasonable basis test." This test applies when the classifications are in the area of economic activities and social welfare. As the U. S. Supreme Court stated in the case of Dandridge v. Williams[61]

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

However, when the classification in question is based on nationality or race, it is called an "inherently suspect" classification and it must meet a heavier burden to justify it. The test applied is the "strict scrutiny" test; the only way a state can pass it is if it can show that the classification is necessary to the accomplishment of compelling state interest.[62]

This is a legalistic way of saying that state classifications which appear to be based on race or nationality or alien status must be much more carefully reviewed than other classifications

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[61] 397 U. S. 471, 485 (1969).

[62] Loving v. Virginia, 388 U. S. 1, 11 (1967).

by the courts. Thus, in the area of economics and social welfare a state has "considerable latitude in allocating . . . AFDC resources, since each state is free to set its own standards of need and to determine the level of benefits by the amount of funds it devotes to the program."[63] However, when a state's classification creates two classes of needy persons--for example, the first consisting of needy individuals predominanty non-Indians, not residing on Indian reservations, and the second composed of needy individuals, virtually all of whom are Indians, residing on Indian reservations--the classification is "inherently suspect" on racial grounds.[64] This standard would apply whether or not the classification specifically mentioned "Indians" as a class.

In addition, such a classification would very likely be violative of Section 601 of Title VI of the Civil Rights Act of 1964 which reads:

> No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[65]

It should be noted that the equal protection clause of the U. S. Constitution applies to persons, not just citizens, and that--further--the Social Security Act applies to persons, not just citizens. This principle, in reference to the Social Security Act, was firmly established by the Supreme Court in Graham v.

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[63] King v. Smith, 392 U.S. 309, 318-319 (1968).

[64] The question then would be whether the state's arguments, such as "Indians do not pay state taxes" or "We cannot license foster homes on reservations" represent a "compelling state interest." The "tax argument" is discussed below in this Section.

[65] 42 U.S.C. § 2000(d). The Civil Rights Act was used successfully, as an example, in Natonabah v. Board of Education of Gallup-McKinley County School District, 355 F. Supp. 716 (D. N. Mex. 1973) where Johnson-O'Malley funds were used discriminatorily against Indians by the school district.

Richardson (1971)[66] one of the long line of welfare cases which came before the Court. The Court struck down an Arizona statute which denied a person general assistance unless that person:

> Is a citizen of the United States, or has resided in the United States a total of fifteen years. . . . "[67]

And it struck down a Pennsylvania statute that denied public assistance to an alien. This case should remove any question as to whether Indians are entitled to welfare benefits and services equally with other persons regardless of their citizenship status.

In Goldberg v. Kelly, 397 U. S. 254 (1970), the Supreme Court established the principle that due process--proper notice, fair hearings, etc.--applied to the granting and denial of Social Security benefits and services to recipients. This principle is another example of the development of Constitutional scrutiny in the delivery of Social Security benefits.

HEW Case Law--Cases of General Applicability

Since 1968, the U. S. Supreme Court has been repeatedly called upon to interpret the Social Security Act as the result of class action suits brought by potential recipients challenging state or federal regulations or administrative interpretation of the Act. These suits, part of the emergent field of welfare or poverty law and largely brought by legal aid attorneys, prompted the Supreme Court to delineate certain principles in the Act which previously had not received administrative emphasis. As applicable to this study, those principles are:

I. The statutory purpose of Title IV is to strengthen family life.

II. There is a constitutional prohibition against tying welfare benefits or services to the contribution of individuals to state taxes.

III. There is a prohibition, inherent in the act, against the use of welfare assistance or benefits to enforce moral judgments.

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[66] 403 U. S. 365 (1971)

[67] Ibid., at 367.

I. The Statutory Purpose of Title IV Is To Strengthen Family Life

The purpose of Title IV-A is to "encourag[e] the care of dependent children in their own home or in the homes of relatives," "to help maintain and strengthen family life," and "to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection."[68]

The U. S. Supreme Court has stressed the significance of this statutory purpose of strengthening family life.[69] The classic language for this proposition appears in Dandridge v. Williams. where the court discusses Title IV-A, as follows:

> The very title of the program, the repeated references to families added in 1962, Pub. L. 87-543, § 104(a)(3), 76 Stat. 185, and the words of the preamble quoted above, show that Congress wished to help children through the family structure. The operation of the statute itself has this effect. From its inception the Act has defined "dependent child" in part by reference to the relatives with whom the child lives. When a "dependent child" is living with relatives, then "aid" also includes payments and medical care to those relatives, including the spouse of the child's parent. 42 U.S.C. § 606(b) (1964 ed., Supp. IV). Thus, as the District Court noted, the amount of aid "is * * * computed by treating the relative, parent or spouse of parent as the case may be, of the "dependent child" as a part of the family unit." 297 F. Supp., at 455. Congress has been so desirous of keeping dependent children within a family that in the Social Security Amendments of 1967 it provided that aid could go to children whose need arose merely from their parents' unemployment, under federally determined standards, although the parent was not incapacitated. 42 U.S.C. § 607 (1964 ed., Supp. IV).
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> The States must respond to this federal statutory concern for preserving children in a family environment.[70]

II. There Is A Constitutional Prohibition Against Tying Welfare Benefits Or Services To The Contribution Of Individuals To State Taxes

The classic case for this proposition is Shapiro v. Thompson 394 U. S. 618 (1969). Here, the states of Connecticut and

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[68] 42 U.S.C. § 601.

[69] "Family Life" as construed in this section encompasses the extended family," not just a family of natural or adoptive parents.

[70] 397 U. S. 471, 479 (1970).

Pennsylvania and the District of Columbia attempted to justify a one-year residency requirement as a criteria for eligibility to AFDC on a number of grounds, including the fact that new residents, as opposed to old residents, had not contributed to the community through the payment of state taxes and therefore should not be entitled to (partially state financed) AFDC benefits.[71] The court summarily dismissed this rationale as an invidious classification and a violation of the Equal Protection Clause:

> Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.
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> We recognize that a state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.[72]

III. There Is A Prohibition, Inherent in the Act, Against The Use of Welfare Assistance or Services To Enforce Moral Judgments

In one of the first major welfare cases to come before the court, King v. Smith,[73] the State of Alabama sought to justify

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[71] The "durational residency" requirement was hardly unique to these states and the District of Columbia at the time. As of 1964, only 11 jurisdictions did not impose a residency requirement for AFDC assistance. Thus, in striking down this requirement the Supreme Court effectively reversed a procedure adopted by 39 states. This is illustrative of the impact which class action litigation has had upon the face of welfare law. (Cf. Shapiro v. Thompson, 394 U. S. 618, 639, n. 22 (1969)).

[72] 394 U. S. at 632, 633 (footnotes omitted).

[73] 392 U. S. 309 (1968).

its "substitute father" regulation or "man-in-the-house rule" on the grounds that it could legitimately use the Social Security Act and AFDC provisions for the purpose of regulating "morality." This regulation defined a parent, within the definition of the Act, as a man who cohabits with the child's natural or adoptive mother in the home or elsewhere.[74] Whether or not such an individual was legally obligated to support the child, his existence, by Alabama's regulation, constituted parental support of a non-absent parent within the definition of "dependent child,"[75] and terminated AFDC benefits to all the children of the applicant mother. Alabama attempted to justify this regulation on the ground that it discouraged the immoral cohabitation of unmarried individuals and discouraged an AFDC mother from cohabiting.

The court struck down the assertion that Alabama could use the AFDC program in this manner to discourage immorality. In doing so, the court gave a thumbnail sketch of the development of the welfare program in the United States which included these observations:

> 1. In the last half of the 19th Century welfare programs treated only the "worthy poor." The "worthy person concept" characterized the mother's pensionwelfare programs which were the precursors of AFDC . . . . Benefits under the mother's pension programs, accordingly, were customarily restricted to widows who were considered morally fit.[76]
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> 2. In this social context it is not surprising that both the House and Senate Reports on the Social Security Act of 1935 indicate that states participating in AFDC were free to impose eligibility requirements relating to the 'moral character' of applicants."[77]
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> 3. "Suitable home provisions" which "frequently disqualified children on the basis of alleged immoral

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[74] Similar regulations at the time of this case existed in 19 states and the District of Columbia (King v. Smith, 392 U. S. at 337 (1968)). Thus, King v. Smith represents another instance of class action suits effectively reversing state implementation practices over a wide section of the country.

[75] 42 U.S.C. § 606(a).

[76] 392 U. S. at 320-321.

[77] 392 U. S. at 321.

behavior of their mothers" were adopted in many state AFDC plans.[78]

4. In the 1940's, [c]ritics argued, . . . that such disqualification provisions . . . were habitually used to disguise systematic racial discrimination; and that they senselessly punished impoverished children on the basis of their mother's behavior, while inconsistently permitting them to remain in the allegedly unsuitable home.[79]

5. In 1945, the predecessor of HEW produced a state letter arguing against suitable home provisions and recommending their abolition. Fifteen states compled; others did not.[80]

6. In the summer of 1960, approximately 23,000 children were dropped from Louisiana's AFDC rolls on the basis of its unsuitable home provision. As a result, Secretary Flemming of HEW issued what is now known as the Flemming Ruling, stating that as of July 1, 1961,

> A state plan . . . may not impose an eligibility condition that would deny assistance to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home . . .[81]

7. In 1962, Congress made permanent the provision for AFDC assistance to children placed in foster homes and extended such coverage to include children placed in child-care institutions. It modified the now statutory Flemming rule, § 404(b) of the Act, to permit states to disqualify AFDC aid children who live in unsuitable homes provided they are granted other adquate care and assistance. [82]

The court concluded that: "The statutory approval of the Flemming Ruling . . . precludes the states from otherwise denying AFDC assistance to dependent children on the basis of their mother's alleged immorality . . ."

HEW Case Law--Cases Applicable to Indians' Right To Receive Benefits

The question of whether Indians are entitled to social security welfare benefits equally with other citizens of a state has been addressed in several legal opinions, statutes, and cases.

[78] 392 U. S. at 321.

[79] 392 U. S. at 321.

[80] 392 U. S. at 322.

[81] 392 U. S. at 322-323.

[82] 392 U. S. at 324.

Although on two separate occasions state welfare institutions attempted through litigation to avoid responsibility for making such payments, in each instance they were unsuccessful. The weight of legal authority is on the side of the equal entitlement of Indians to benefits; and no statutory or case law appears to the contrary.

The clearest exposition of the authorities is a chronological one. In order, on June 2, 1924, citizenship was granted to all Indians born within the territorial limits of the United States:

> That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.[83]

This section was incorporated, in effect, into the Nationality Act of October 14, 1940,[84] which cleared up any doubt as to the status of Indians born after the effective date of the Act of 1924 and was reenacted in the act of June 27, 1952. Thus 8 U.S.C. 1401 reads in pertinent part:

> (a) The following shall be nationals and citizens of the United States at birth: . . .
> (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe.

Concern that Indians might be discriminated against in obtaining Social Security benefits developed during and after passage of the Social Security Act. In 1935, Assistant Solicitor Felix Cohen, of the Department of Interior, expressed his anxiety that Indians would not receive full benefits. Speaking of the Economic Security Bill, Cohen stated:

> . . . a fair reading of the Economic Security Bill (H. R. 4120) requires the conclusion that Indians, being citizens of the United States

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[83] 433 Stat. 253; 8 U.S.C.A. § 3.

[84] 8 U.S.C.A. § 601. See also Harrison v. Laveen, 196 P.2d 457, 459.

> and of the States wherein they reside are included in the benefits of the Act.[85]

He cautioned, however, that:

> . . . discrimination against Indinas as against other minority groups, is probable in any administration of Federal funds which is placed in the hands of state and local authorities.[86]

In 1936, the Solicitor of the Interior Department rendered an opinion which held that the Social Security Act was applicable to Indians.[87] The opinion had three facets: First, that the Social Security Act required that aid to needy aged individuals, to needy dependent child and to the needy blind be administered through a state plan which must be "in effect in all political subdivisions of the State" and as Indian reservations are included within states, counties and other political subdivisions, Indians are entitled to aid under state plans. Second, that one of the bases for allotment of federal funds was population of states and the population statistics included Indians. The Solicitor reasoned:

> In computing these statistics no omission is made of the Indians and official registration and census rolls have been used which, of course, include the Indian population. It would be manifestly contrary to the intention of the act that funds allotted to cover a certain number of people should be used only for a chosen group to the exclusion of others included in the count.

Third, the opinion concluded that Indians as citizens were entitled to the benefits.

The issue quickly appeared in litigation, State ex rel Williams v. Kemp.[88] The question was whether the State of Montana or the counties in the state were responsible for the payment of welfare benefits to reservation Indians. The Supreme Court

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[85] Memo. Sol. I. D., February 14, 1935. See also Schiffler, Trends in Federal Indian Administration, 15 So. Dak. L. Rev. 2, n. 4 (1970).

[86] Ibid.

[87] Memo Sol. I. D., April 22, 1936.

[88] 78 P.2d 585 (Mont. 1938).

of Montana was requested to interpret a state statute which required that the state general fund reimburse the counties for social security assistance to ward Indians. In the process of rendering its opinion that the state general fund was responsible, the court discussed Indians' entitlement to Social Security benefits as citizens:

> . . . the broad language of the federal Social Security Act on its face made the grants to the states contingent upon the fact that no citizenship requirement should exclude any citizen of the United States from relief benefits. Indians are citizens of the United States.
>
> The Montana Legislature, confronted with the question of choosing to accept or reject federal grants, chose to accept them. To do this it was obliged to meet the conditions imposed.[89]

Despite the fact that this language is technically dictum, State v. Kemp has remained up to the present an often cited case for the proposition that Indinas are equally entitled to Social Security benefits.

The issue remained quiescent, at least insofar as legal interpretation, for 16 years. In 1954, however, at the height of termination philosophy, Arizona and San Diego County in California became actively involved in attempts to limit state and county liability for Indian welfare payments.

Arizona excluded reservations Indians from its state plan by an enactment of the state legislature which read:

> . . . no assistance shall be payable under such plan to any person of Indian blood while living on a federal Indian reservation.[90]

Arizona then submitted a plan under Title XIV of the Federal Social Security Act "for aid to the permanently and totally disabled," pursuant to the state statute, which excluded Indians. HEW's predecessor, the Federal Security Agency, refused to approve the plan on two grounds: that the plan was racially discriminating

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[89] 78 P.2d at 587.

[90] A.R.S. § 46-232(A).

and that it imposed as a condition of eligibility a residence requirement prohibited by § 1402(b)(1) of the Social Security Act.

Arizona thereupon brought suit to declare that its plan did meet the requirement of the FSA and to compel the Administrator to approve it. In Arizona v. Hewing,[91] the court rejected the theory that the state program was racially discriminatory but it found that the exclusion of Indians by Arizona was arbitrary, despite Arizona's argument that the federal government had the ability to support Indians directly, presumably through the BIA. Arizona appealed this ruling to the circuit court but its suit was dismissed entirely on jurisdictional grounds [92] for failure to allege that the acts of the sovereign United States were either ultra vires or unconstitutional.

There the matter rested. Arizona v. Hobby is sometimes cited as legal authority that a state may not discriminate against Indians in the delivery of Social Security benefits but the case was dismissed entirely upon jurisdictional rather than substantive grounds. On the other hand, Arizona v. Hobby represents an important historical episode in the resolution of the question of a state's responsibility for reservation Indian welfare benefits, as well as the farthest any state has attempted to take the legal argument.

Acosta v. San Diego County[93] is the only extant case which is directly on point and thus it is a case of first, and only, impression. San Diego County attempted to deny welfare under the Welfare and Institutions Code of California, § 2501, to reservation Indians on the ground that they were not residents of the

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[91] Civil No. 2008-52 (D. C. 1954) (unreported). Cf. Note, "Welfare's Condition" Yale L. J. 1222, 1227-1228 (1967).

[92] Arizona v. Hobby, 221 F.2d 498 (D. C. 1954).

[93] 126 Cal. App.2d 455, 272 P.2d 92 (1954).

county for the purpose of obtaining direct county relief. On appeal the court found that reservation Indians were entitled to relief on the constitutional basis of the 14th Amendment right to equal protection. In pertinent part, the opinion reads:

> The argument that responsibility for reservation Indians rests exclusively on the federal government has been rejected . . . . That reservation Indians are entitled to direct relief from either the state or county in which they reside was conceded in State ex rel Williams v. Kemp, 106 Mont. 444, 78 P.2d 585. The only issue there was which political body should bear the expense.
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> From the conclusion reached that Indians living on reservations in California are citizens and residents of this state, it must therefore follow that under section 1, Amendment XIV of the Constitution of the United States they are endowed with the rights, privileges and immunities equal to those enjoyed by all other citizens and residents of the state.[94]

The issue of equal entitlement of Indians to Social Security benefits has never been directly addressed by the United States Supreme Court. Nevertheless the Court in the recent case of Ruiz v. Morton,[95] which had nothing to do with HEW law but rather with BIA responsibilities, stated in dictum its view that social security benefits could not be denied to an Indian, whether living on a reservation or elsewhere. It said:

> Any Indian, whether living on a reservation or elsewhere, may be eligible for benefits under the various social security programs in which this state participates and no limitation may be placed on social security benefits becasue of an Indian claimant's residence on a reservation.[96]

HEW Case Law--The Caretaker Relative Provisions As Applicable To The Extended Family

Although the Social Security Act has nothing to say pertaining to American Indian family customs, one aspect of the Act does have particular applicability to American Indian family structure, namely the "caretaker relative" provisions of Title IV-A. These

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[94] 272 P.2d at 98.

[95] 415 U. S. 199 (1974).

[96] Ibid.

provisions[97] include as a definition of a "dependent child" a child who is living in the home of relatives; and state that the purpose of the act is to strengthen and help maintain the family life of dependent children, whether the family consists of parents or relatives.

The most significant of these provisions are Sections 601 and 606, whereas the other sections, which include references to relatives with whom the dependent child is living, deal with the mechanics of the payment of benefits. Section 601, the general purpose section of Title IV-A, states that the purpose of the title is to

> . . . encourag[e] the care of dependent children in their own homes or in the homes of relatives by enabling each state to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such state, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . (emphasis added)

Section 606(a)(1) defines "dependent child" as a needy child who:

> . . . has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, mother, sister, stepfather, stepmother, stepsister, uncle, aunt, first cousin, nephew or niece, in a place of residence maintained by one or more such relatives as his or her own home . . . (emphasis added)

The importance of these provisions to Indian family life lies in the fact that the prototype Indian family is the "extended family," in contrast to the parental family, either natural or adoptive, of non-Indian society. In addition, in Indian society the procedures for determining which members of the extended family will care for a child are usually informal. Failure of the present welfare system to take into account the extended family and its customs would naturally run the risk of precluding benefits

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[97] 42 U.S.C. §§ 601, 602(a)7, 602(a)(14), 602(a)(15)(A), 602(a)(19)(A)(i), 602 (a)(16), and 606.

and services to Indian extended families or might transfer Indian children to non-Indian foster homes where the extended family does not prevail.

In a number of instances, the issue of excluding "caretaker relative" families from AFDC benefits has arisen. Courts uniformly have struck down such state regulations under the Supremacy Clause as inconsistent with Title IV-A of the Social Security Act. Two Texas and one Arizona case on this point follow.

(1) The Texas Cases: Lopez v. Vowell and Rodriguez v. Vowell (1973)

Texas attempted, through provisions in its Financial Services Handbook, to serverely limit the eligibility of a "caretaker relative" family for AFDC benefits. In one set of provisions it required that "caretaker relatives" be single; in another, that income and resources of the dependent child could not be directed to other members of the household but only to the child, and if they were sufficient to his needs, he would not be considered "dependent."

At issue in Lopez v. Vowell[98] was the legality of two Texas regulations in the Texas Financial Services Handbook which required as a condition of eligibility that a "caretaker relative" entitled to AFDC could not be married and living with a spouse. These provisions were challenged by a married caretaker relative as being inconsistent with § 406 of the Social Security Act and therefore violative of the Supremacy Clause. Alternatively, the conditions were challenged as violative of the Equal Protection Clause of the 14th Amendment.

The court never reached the equal protection argument. It found the state's eligibility requirement directly contrary to the Social Security Act and discounted the state's contention that the requirements were directly related to a determination of need. The court said:

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[98] 471 F.2d 690 (5th Cir. 1973), cert. denied, 411 U. S. 939 (1973).

> The plain language, legislative history, and purposes of the Act make clear that so long as one is needy and qualifies as a caretaker relative with the meaning of § 406, 42 U.S.C.A. § 606, no further restriction on eligibility for assistance is permissible.[99]

The Court then discussed in detail the statute and the Congressional intent to make AFDC benefits available to caretaker relatives:

> Nowhere does the statute indicate that the caretaker must be a single individual in order for his or her needs to be included in calculating the amount of the AFDC grant. For a family to be eligible for AFDC assistance, the needy children, in addition to living with certain specified relatives, must have been "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent." 42 U.S.C.A. § 606(a) (emphasis supplied). It is the absence of a parent which is critical to AFDC eligibility, not the absence of a relative or the spouse of a relative. In fact, in defining a "dependent child" as one who resides with "one or more" of the specified relatives, § 406(a) explicitly recognizes that a child might be living with a married relative. Similarly, § 406(c) defines a "relative with whom any dependent child is living" as "one of the relatives specified in subsection (a) of this section and with whom such child is living . . . in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home." 42 U.S.C.A. § 606(c) (emphasis supplied). Thus, although money payments are generally available only to meet the needs of one of the relatives with whom the child is living, 42 U.S.C.A. § 606(b)(1), the presence of other relatives in the home, including tne spouse of the caretaker relative, was clearly forseen. Indeed, the Act not only contemplates the presence of the caretaker's spouse, but specifies that in certain situations the spouse is also to receive aid, 42 U.S.C.A. § 606(b)(1). This particularization is cogent evidence that Congress did not authorize the States to limit eligibility to unmarried caretakers.[100]

Rodriguez v. Vowell,[101] decided two weeks later, represents a successful challenge to another provision of the Texas Financial Handbook, in this case a requirement that income and resources accruing to a child in his own right could not be diverted to the needs of other members in the household but had to be applied toward the child's need. If such income was sufficient or more

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[99] 471 F.2d at 695.

[100] 471 F.2d at 693-394.

[101] 472 F.2d 622 (Tex. App. 1973), cert. denied, 412 U. S. 944.

than sufficient to meet the child's needs, the child--by the regulation--would not be considered dependent.

Again, the court did not get to the equal protection argument. It found the Texas regulations violative of the Social Security Act under the Supremacy Clause. Even more so than in Lopez, supra, the court focussed upon the importance of the caretaker relative concept to the preservation of family life within the purpose of the Act. It dealt with statutory interpretation, precedent and legislative history, beginning its discussion with these words:

> The plain language of the Social Security Act, its legislative history, and the relevant decisional precedent make clear that the needs of the caretaker relatives as well as those of the dependent child are to be considered in deciding if a family is eligible for an AFDC grant. (472 F.2d at 624).

The court dealt with portions of the Act as follows:

> 42 U.S.C. § 601
> Recognizing the inseparability of the needs of the child from the needs of the relative with whom the child is living, § 401 of the Act emphasizes that the purpose of the AFDC program is to help the child by preserving and strengthening the family entity. (472 F.2d at 624)

> 42 U.S.C. § 606(A)
> . . . as the benefits which flow from living at home rather than in an institution were deemed important, the relative was required to care for the child in the relative's own home, . . . (472 F.2d at 625)

> 42 U.S.C. §§ 602(a)7 and 606(b)
> . . . in measuring need, the need of the family unit is the quesion, not the need of the child alone; for the goal of strengthening the family entity can only be achieved if the needs of the caretaker relative are included in determining eligibility. Accordingly, § 406(b) of the Act explicitly provides that "aid to families with dependent children" includes assistance to meet the needs of the caretaker relative . . ."[102]

In considering the legislative history, the court stated:

> A. 1950 Legislative Amendments in Committee
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> . . . the legislative history of the 1950 Amendments to the Social Security Act, which added coverage for

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[102] 472 F.2d at 625.

caretaker relatives, demonstrates that eligibility of the caretaker was not made contingent upon the separate individual needs of the child . . . . Caring for a dependent child prevents the caretaker from working and, in the absence of other funds, the caretaker would be forced to share in the meager payments made to the child. See House Committee on Ways and Means, Hearings on H. R. 2892 and H. R. 2893, 81st Cong. 1st Session at 14 and 399.[103]

B. On the Senate Floor

The policies behind extending assistance to caretaker relatives were clearly explained on the floor of the Senate by Senator Lehman:

> This proposal is a simple matter of humanity, common sense and justice. It is obviously neither humane nor sensible to make provision for children who are needy because of the death, disability or desertion of the family breadwinner and fail to make provision for the mother (or some other caretaker relative) of such children.[104]

C. 1962 Legislative Change

Perhaps the strongest indication that Congress intended to assist dependent children by strengthening the family unit through aid to the caretaker relative is the fact that in 1962 the name of the public assistance program was changed from "Aid to Dependent Children" to "Aid and Services to Needy Families with Children" Pub. L. 87-543, 76 Stat. 185 (July 25, 1962). The Senate Report accompanying the bill explained that "[i]n line with the new emphasis in family services, the bill would provide that the name of the program be changed . . . ." A. Rep. NO. 1589, U. S. Code Cong. and Admin. News, 87th Cong., 2d Session, pp. 1943, 1956, (1962). (Court's emphasis)[105]

The court cited Dandridge v. Williams for the decisional precedent that a family unit that included a caretaker relative was contemplated as eligible for benefits within the meaning of the AFDC program.

(2) The Arizona Case: The "Legal Adoption" Requirement. Arizona State Dep't. of Welfare v. Department of HEW 449 F.2d 456 (9th Cir. 1971)

The Arizona State Department of Welfare in its Assistance Payments Manual, included this provision:

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[103] Ibid.

[104] Ibid.

[105] Ibid. at 626.

> A relative of a natural parent who is an ADC recipient cannot be approved for an ADC grant on behalf of any of the children of said parent unless said relative or the (Arizona) Department of Public Welfare has legal custody of the child or children named in the application.[106]

The Secretary of HEW found that this provision of Arizona's public assistance plan failed to conform to the requirements of the Social Security Act and refused to approve the plan. Arizona sought judicial review as permitted under 42 U.S.C. § 1316(a).

The Court--not reaching the equal protection issue--found that the manual provision failed to be in conformity with the AFDC program. Citing 42 U.S.C. § 601, it underlined the portions below:

> For the purpose of encouraging the care of dependent children in their own homes or in the home of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such state, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence . . . .[107]

And in 42 U.S.C. § 606:

> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepsister, uncle, aunt, first cousin, nephew or niece in a place of residence maintained by one or more of such relatives as his or their own home . . . .[108]

It then struck down Arizona's contention that the definition of family within Title IV was one of parents and children only:

> Arizona makes several claims on behalf of its requirement, with none of which we agree. First, Arizona asserts that the requirement is "[i]n strict conformity with the Federal Aid to Families with Dependent Children" to help maintain and strengthen family life, "because it discourages the splitting-up of parents and children. As we have pointed out, however, a "family" within the meaning of the AFDC

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[106] 449 F.2d 456 at 474.

[107] Ibid. at 475.

[108] Ibid. at 476.

> provisions of the Act does not comprehend only the child and his parents. A household consisting of the child and his 'grandfather, grandmother, etc." is as much a "family" within the meaning of the Act as is a household consisting of the child and his mother or father. (emphasis supplied)[109]

Then the Court dealt with the underlying issue of the effect of such an impermissible eligibility requirement on the informal customs of American Indian and Mexican-American extended families:

> This point is particularly critical in this case, since, as the evidence showed and as the Administration pointed out a common, if not the predominant cultural pattern among Mexican-Americans and Indians in Arizona is the extended family. Under this cultural system, it is common for children to live for short periods with relatives. In order to receive AFDC, however, these relatives would have to undertake the burdensome and costly task of acquiring legal custody, which may invest the situation with a degree of permanence that is unacceptable to everyone concerned. Thus, Arizona's legal custody requirement falls especially heavily on Arizona's Mexican-American and Indian minorities.[110]

Attempts To Obtain Additional Federal Funding For State Public Assistance Programs For Reservation Indians

The Social Security Act, as originally enacted in 1935, contained no provisions that were specifically related to Indians. However, the Senate approved an amendment which would have established a special pension program for blind, crippled and needy aged Indians.[110a] This proposal was deleted from the bill in conference committee. It was supported by John Collier, then Commissioner of Indian Affairs, who noted that elderly Indians

> now subsist at a near-starvation level through such help as relatives may be able to give them and through the very inadequate relief grants now made to the Indian Office.
>
> . . . Usually they do not have access to the relief sources which imperfectly serve the needs of aged white people.[110b]

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[109] Ibid. at 477.

[110] Ibid. at 477.

[110a] 79 Cong. Rec. 9540 (1935).

[110b] Ibid. at 9540-41.

Two years after the Social Security Act was passed, there began a long and remarkably consistent series of Congressional bills to increase the federal matching share for state plans for public assistance to Indians living on reservations. The first of these bills, S. 1260,[111] introduced in 1937 directed the Social Security Board to furnish to "Indian wards of the United States" all benefits authorized by the Social Security Act to be provided under approved state plans, and authorized the necessary appropriations. In other words, it would have transferred the administrative and financial responsibility for these programs to the federal government. This bill was never reported out of committee. An interesting feature of this bill is the large number of sponsors, and the states they represented. The following table lists these states and the number of Senators from each of these states sponsoring S. 1260:

Arizona - 2	New Mexico - 2	South Dakota - 2
Idaho - 2	North Dakota - 2	Utah - 2
Montana - 2	Oklahoma - 2	Washington - 2
Nevada - 2	Oregon - 1	Wyoming - 2

Virtually every state with a substantial reservation Indian population is represented in this list.

A bill introduced in 1938 (75th Congress, 2d Session) by Senator Nye of North Dakota--S. 3802--would have authorized an additional grant for aid to dependent Indian children. It also died in committee.

The next year, 1939, saw the introduction of two new bills by Senator Hayden and Representative Murdock, both of Arizona. Hayden's bill, S. 17, would have added a new Title to the Social Security Act to provide grants to states for old-age assistance, aid to dependent children, and aid to blind programs for Indians living on trust land. Representative Murdock's bill, H. R. 920, would have mandated aid to Indians under these programs, with the

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[111] The bill died in committee.

federal government paying the full amount of these assistance payments to Indians plus 10% administrative costs. Both of these bills failed to get out of committee.

While Senator Hayden was unable to get committee approval of his bill in 1939, he was able to have the subject brought before the Senate through an amendment to another bill. This amendment would have required federal reimbursement for state expenditures for aid to on-reservation Indians under the aid to dependent children, aid to the aged, and aid to the blind programs, if the state plan for such programs "includes Indians upon the same conditions as other persons covered by such plan."[111a] In addition, this amendment would have specifically authorized the Office of Indian Affairs (predecessor to the BIA) to "enter into arrangements" for the Office of Indian Affairs to administer any part of any such state plan with respect to Indians. There was a division in the federal executive response to this proposal: the Interior Department, in a letter which was not published in the Congressional Record, stated its strong opposition, while the Social Security Board (HEW's predecessor) supported it.[111b] Though the reasons for these agency positions were not clearly delineated in the floor debate, it appears that Senatorial support was based on the argument that "throughout the West the States receive no taxes or other income from the various Indian reservations."[111c] Senator Hayden seems to have been motivated by a concern for the costs of these programs to the states rather than by an interest in providing these benefits to Indians, since he offered, as an alternative to this amendment, a proposal which would have prohibited federal disapproval of a state plan "because

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[111a] 84 Cong. Rec. 9027 (1939).

[111b] Ibid. at 9028.

[111c] Ibid. at 9027.

such plan does not apply to or include Indians" living on a reservation. It was this second proposal--which would have authorized a state's refusal to provide assistance to on-reservation Indians--which passed the Senate, in part because this approach had been favored in committee.[111d] However, as with the 1935 Indian pension amendment, this Senate-added amendment was deleted from the final bill by the conference committee.

In 1949 (81st Congress, 1st Session), bills introduced in both the House and Senate would have provided federal aid equal to 80% of the total spent under a state plan. While these bills failed to reach the floor, this basic formula was incorporated the next year in the Navajo-Hopi Act. This bill is discussed in more detail below.

The bills introduced in the following years fall into two general categories. The first consists of efforts to extend the special matching formula in the Navajo-Hopi Act to all Indian public assistance recipients, or solely to Navajos and Hopis receiving benefits under other programs under the Social Security Act. These bills are as follows:

84th Cong., 2d Sess. (1956) - S. 3548 (limited to Navajos and Hopies, extended to other programs).
85th Cong., 1st Sess. (1957) - S. 54 (same as S. 3548 of previous Session).
88th Congr., 2d Sess. (1964) - H.R. 10230 (similar to S. 3548).
89th Cong., 2d Sess. (1966) - S. 3527, H. R. 15844 (similar to S. 3548).
91st Cong., 1st Sess. (1969) - S. 2265, H. R. 6776 (extends Navajo-Hopi Act matching formula to Indians nationwide and extended to other programs).
91st Cong., 2d Sess. (1970) - H. R. 17060 (similar to S. 2265 and H. R. 6776 of previous session.

None of these bills was reported out of committee. It should also be noted that S. 2265, introduced in 1969, attracted a long list of sponsors, including Senators from such states as Maine, West Virginia, and New Jersey, none of which has any federally-recognized reservations, and Senators from diverse ideological

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[111d] Ibid. at 9027-28.

backgrounds--from McGovern to Goldwater.

The second category of post-1950 bills were summarized as providing "for a more equitable apportionment between the Federal Government" and certain specified states "of the cost of providing aid and assistance under the Social Security Act to Indians." The states specified in these bills were always one or more of six states: Minnesota, North Dakota, Wisconsin, Idaho, and Washington. The bills are as follows:

84th Cong., 2d Sess. (1956) - S. 4137 (No. Dak.), S 4242 (No. Dak.).
85th Cong., 1st Sess. (1957) - S. 574, H. R. 3362, 3634 (Wisc., Minne., No. Dak., So. Dak.), S. 1015 (So. Dak.).
88th Cong., 1st Sess. (1963) - H. R. 6279 (all six states).
89th Cong., 1st Sess. (1965) - H. R. 5366 (all six states).
91st Cong., 2d Sess. (1970) - H. R. 17624 (all six states).

Again, every one of these bills died in committee.

There have been two recent instances, in 1970 and 1972, in which amendments which would have increased the federal matching share for certain programs under the Social Security Act for Indian recipients were passed by the Senate, only to die in the conference committee. Both of these would have provided for 100 percent federal funding for assistance--not services--under these programs to Indians, including urban Indians and other native people not living on a reservation.

In 1970, while the Senate was deliberating on a bill to amend the Social Security Act, Senator Metcalfe of Montana introduced an amendment which would have provided that HEW would pay all of the costs of assistance to Indians under several titles (including Title IV-A) of the Social Security Act.[111e] Some of his reasons for offering this amendment were financial: the loss of state and county property tax revenue as a result of the fact

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[111e] 116 Cong. Rec. 43669 (1970).

that land held by the United States in trust for Indians is exempt from such taxes, and the meager state income tax payments made by Indians as a result of their poverty.[111f] But there was another reason, one that was more central to basic issues of federal policy towards Indians. Senator Metcalf maintained that the "American Indian is a Federal responsibility,"[111g] which extends even to urban Indians because many of these people moved from their reservations to urban centers as a direct result of a federal relocation program.[111h] His arguments prevailed and his amendment was passed by the Senate, only to be deleted in conference.

Senator Metcalf placed this same proposal before the Senate in slightly different form as an amendment in 1972 to H. R. 1, which included the family assistance plan.[111i] Senator Stevens of Alaska, presenting this amendment for Senator Metcalf, made essentially the same arguments as were made in 1970. The only additional point raised was the endorsement of this idea by the National Governors' Conference, which stated, in its 1972 list of policy positions:

> The federal government should administer the Social Security Act programs on the federal Indian reservations, or if the states are to discharge this function, the federal government should first grant adequate jurisdictional authority to the States thereby enabling them to properly discharge this function.[111j]

As with Senator Hayden's 1939 amendments, the governors stated that they would be satisfied with one of two alternatives. However, unlike 1939, the governors did not request that Indians

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[111f] Ibid. at 43670.

[111g] Ibid. at 43669.

[111h] Ibid. at 43673.

[111i] 118 Cong. Rec. 33427 (1973).

[111j] Ibid. at 33428.

living on reservations could be excluded, at the states' option, from Title IV-A and similar programs. Instead, they requested "adequate jurisdictional authority" to "properly discharge" their duties, without specifying what authority they desired or what they wanted to do with this authority. It is possible that this phrase refers to a desire to assert state civil and criminal jurisdiction, including the taxing power, over on-reservation Indians. If so, such a proposal, if presented to Congress, would probably generate strong Indian opposition.

Senator Metcalf's amendment was adopted by the Senate but, as in 1970, was dropped in the conference committee.

The pattern that emerges from this compilation of proposed legislation is a long series of attempts to have the federal government pay a greater share of assistance to states providing aid and assistance to reservation Indians under programs covered by the Social Security Act. The sponsors for these bills were almost exclusively from states with relatively large Indian populations. One can conclude that the governments of these states, dissatisfied with the amount of money they were required to expend for Indians living on trust lands, petitioned for additional federal aid. These bills show that this concern has been long-standing and persistent.

The Navajo-Hopi Act

The one exception to the consistent pattern of failure of the bills discussed above is the so-called Navajo-Hopi Act. This Act, codified at 25 U.S.C. § 639, originally provided as follows:

> Beginning with the quarter commencing July 1, 1950, the Secretary of the Treasury shall pay quarterly to each State (from sums made available for making payments to the States under sections 3(a), 403(a), and 1003(a) of the Social Security Act) an amount, in addition to the amounts prescribed to be paid to such State under such sections, equal to 80 per centum of the total amounts of contributions by the State toward expenditures during the preceding quarter by the State, under the State plans approved under the Social Security Act for old age assistance, aid to dependent children, and aid to the needy blind, to Navajo and Hopi Indians residing within the boundaries of the State on reservations or on allotted

> or trust lands, with respect to whom payments are made to the State by the United States under sections 3(a), 403(a), and 1003(a), respectively, of the Social Security Act, not counting so much of such expenditure to any individual for any month as exceeds the limitations prescribed in such sections.

This provision is limited to state expenditures for "Navajo and Hopi Indians residing within the boundaries of the state on reservations or on allotted or trust land." In effect, this limits the Act to Arizona, New Mexico, and Utah. It is also limited to certain programs, one of which is the Title IV-A AFDC program.

The special matching formula is that the federal government shall pay, in addition to its usual matching share, 80 percent of what the state would normally pay. Thus, as the Conference Committee report explained,[112] if the matching formula is 60-40 before application of the Navajo-Hopi Act, and the AFDC payment for a particular child is $50.00, the result is as follows:

$30.00	-	Usual federal matching share
16.00	-	Special matching share under Navajo-Hopi Act
$46.00	-	Total federal contribution

The state is required to pay only 8 percent, instead of the customary 40 percent. Since the normal matching formula for some programs is 75-25 and 90-10, the result of this Act would be a 95-5 and 98-2 percentage distribution for these programs.

One reason for the passage of this Act, when so many similar bills had failed, is that it was attached to a bill to promote the rehabilitation of the Navajo and Hopi tribes, the members of which were living in extreme poverty.[113] The provisions concerning the Social Security Act were added, in an amendment by the House, as Section 9.[114] The Act with this Section 9 was

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[112] 1950 U. S. Code Cong. & Admin. News 2020.

[113] 1950 U. S. Code Cong. & Admin. News. 2013.

[114] A bill, S. 1407, which was substantially identical to the Navajo-Hopi Rehabilitation Act, was vetoed by President Truman because it contained a Section 9 which, with certain exceptions, would have extended state civil and criminal jurisdiction over these two tribes. U. S. Code Cong. & Admin. News 2018-19. This bill was reintroduced as S. 2734 from which the objectionable provision was deleted and to which this new Section 9, with the special matching formula, was added by the House.

passed and signed into law, with the Conference Committee deleting certain language from Section 9 which would have defeated its intent.

The arguments for Section 9 stated in the debate on the floor of the House are interesting. Representative Morris of Oklahoma gave three reasons: first, the states benefitted by this provision [Arizona, New Mexico, and Utah] "are very sparsely settled compared with most of the other States of the union;" second, "they have a much heavier impact of Indian population upon them than the others do," and consequently "[t]hose people in the States affected cannot possibly carry on with the same kind of social-security program as to Indians that the rest of us carry on with in the usual circumstances' "and third, "[i]n Arizona out of 72,691,200 acres of land the Government owns 50,471,920 acres or 69.43 percent.[115] The State, of course, receives no tax revenue whatsoever from the land owned by the Federal Government."[116]

These reasons fail to note that until 1949 Arizona and New Mexico refused to include Indians in public assistance programs under the Social Security Act. The Social Security Administration, after unsuccessfully attempting to informally resolve this dispute, held conformity hearings in February 1949.[116a] Before findings of fact or an administrative order based on these hearings

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[115]This statistic apparently includes land under federal ownership and trust land under BIA jurisdiction. The total amount of land in Arizona in these two categories, according to a recent compilation, is 51,636,000 acres. Statistical Abstract of the United States 196, 200 (1973). Comparable statistics in the 1950 statistical abstract must have included trust land as being "under federal ownership," since the total amount of "lands under federal ownership" and "lands under jurisdiction of the Office of Indian Affairs," as listed in that year's abstract, exceeded the total land area in the state.

[116]96 Cong. Record 2086 (1950).

[116a]Wilbur J. Cohen, Public Assistance Provisions for Navajo and Hopi Indians: Public Law 474, printed at 116 Cong. Rec. at 43671 (1970).

were made, representatives of the two states, the Federal Security Agency (the predecessor agency to DHEW), and the BIA--but not the tribes--met in Santa Fe, New Mexico, on April 28-29, 1949. This meeting resulted in the "Santa Fe AGreement," which provided that these states would pay no more than 10% of the total cost incurred by the federal state governments in aid to needy Indians eligible for assistance under Titles I, IV, and X of the Social Security Act.[117] The Navajo-Hopie Act followed. Its provisions effectively insulated these states from having to pay more than 10 percent of the costs for certain public assistance programs to reservation Navajos and Hopis.

The states of New Mexico and Arizona refused to provide aid and services to Indians. This fact, not mentioned by Representative Morris, was apparently the result of the financial factors he did refer to. Thus the combination of two states' refusal to serve Indians and the existence of a popular bill for

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[117] Wolf, Needed: A System of Income Maintenance for Indians, 10 Ariz. L. Rev. 597, 602-03 (1968).

aid to certain tribes in those states seem to have enabled those states to obtain special benefits which other states, also with large Indian populations, were unable to get through Congress.

Special State Provisions For Counties With Indian Reservations

One manner in which states have attempted to relieve the financial pressure upon counties which have Indian reservations, and therefore a limited tax base, is to permit the payment of welfare services to Indians by these counties to come partially or entirely from state funds. A listing of these state provisions follows:

Montana

Counties are not required "to reimburse the state department for any portion of old-age assistance, medical assistance, aid to needy dependent children or aid to the totally disabled paid to ward Indians . . . ." Indian" is defined as "an Indian who is living on an Indian reservation set aside for tribal use, or is a member of a tribe or nation accorded rights and privileges by treaty or by federal statutes."[118]

North Dakota

"Any county in which an Indian reservation is located may apply to the state department for payment, out of state funds, of the entire amount of aid paid toward Indians residing in the county and on the Indian reservation." The state department makes an investigation of the "financial condition" of the county and permits payment if it finds that "the financial condition" is such that it would be inequitable to ask the county to contribute its share of the amount necessary to provide aid to such Indians . . . ." It is unclear from the statute whether this aid is confined to aid to "aged, blind, or disabled" persons.[119]

Minnesota

(1) General

" . . . the commissioner of public welfare shall reimburse counties, cities, towns or any other political subdivision for up to 75 percent of the costs of relief and related services provided to persons of Indian blood . . . . " [120]

"The term 'relief' includes but is not limited to direct relief to persons in their own homes, medical care, . . . maintenance of children not under state guardianship and state wards not otherwise provided for. It shall not include . . . state institutional charges."[121]

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[118] Rev. Codes of Mont. 1947, § 71-211.

[119] NDCC, §50-24-25.

[120] Minn. Stat. 1974, § 245.76(1).

[121] Minn. Stat. 1974 § 245.76(2)(b).

(2) Red Lake

"The commissioner of public welfare . . . shall reimburse any county for all welfare costs expended by the county to any Indian who is an enrolled member of the Red Lake Band of Chippewa Indians and resides upon the Red Lake Indian reservation."[122]

It has been suggested that California institute a provision permitting counties with large Indian populations to obtain welfare costs from the state:

> In the absence of the federal government's assumption of the costs of providing for these Indians, it is submitted that the state, rather than the counties should bear the financial burden of supplying aid and relief to the California Indians because the state may effect a more even distribution of this burden throughout the entire taxable population in California.[123]

The Development of Contracting Principles

While the statutory scheme is that social services under SRS programs would be provided by state or county agencies under an approved state plan and that BIA social services would be provided by the BIA, it appears that this is not true in many cases. Many activities are carried on by other public and private agencies through contracts with the agency which would normally do so. The legal authority for these contracts differs for the different agencies and contracting parties.

HEW Purchase of Services. In SRS programs, the basic system of contracting, or, in the phrase used in the regulations, "purchase of services," is governed by the requirements of 45 C.F.R. Part 226. These regulations are based on 42 U.S.C. § 603(a)(3)(D) and the language immediately following that subparagraph. The statute authorizes federal matching funds for purchase of services

> which in the judgment of the State agency cannot be as economically or as effectively provided by the staff of such State or local agency and are not otherwise reasonably available to individuals in need of them.

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[122] Minn. Stat. 1974, § 245.765(1).

[123] State and Local Governments--Relief--Right of Indians To Indigent County Relief WHile Living on a Federal Reservation, 2 UCLA L. Rev. 143-145 (1954).

Services can be purchased "from other State or local public agencies, from nonprofit or proprietary agencies or organizations, or from individuals."[124] The only limits on the type of services that can be purchased are contained in federal regulations, which state that the state plan must, with respect to services which are purchased:

> Provide that the State or local agency will retain continuing, basic responsibility for determination as to:
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> (i) The eligibility of individuals for services; and
>
> (ii) The authorization, selection, quality, effectiveness, and execution of a plan or program of services suited to the needs of an individual or of a group of individuals.[125]

Along similar lines, regulations set the following condition for implementing the "single state agency" requirement under Title IV-A and other programs:

> The state agency will not delegate to other than its own officials its authority for exercising administrative discretion in the administration or supervision of the plan, including the issuance of policies, rules, and regulations on program matters.[126]

These regulations in effect prohibit a state agency from turning over to another agency or organization the basic responsibility for any major part of its programs. The limits of this prohibition are uncertain. It is clear, for example, that a state agency could purchase the services of an institution for the care of certain persons, and that this institution would have the effective power of determining what form of treatment or therapy would be best for each of these persons. SRS has approved of arrangements in which the BIA or tribal authorities certify that day care facilities meet federal and state standards. In both cases, substantial discretionary authority has been relinquished by the single state agency. It may be that the regulatory prohibitions are

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[124] 45 C.F.R. § 226.1(a).

[125] 45 C.F.R. § 226.1(a)(2).

[126] 45 C.F.R. § 205.100(c)(1).

satisfied if the state agency retains a veto power over the decisions of the agencies or organizations from which it purchases services, even though this veto power is purely theoretical and is never exercised.

BIA Contracts. There are three statutory sources of the BIA's authority to enter into contracts for services. The oldest of these, the "Buy Indian Act," shares with the Snyder Act the quality of breathtaking simplicity:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.[127]

There is no definition for the terms "Indian labor" or "products of Indian industry." Nevertheless, this statute has been used to support a broad range of BIA contracts with Indian tribes, with the most common area of contracts being for Indian police and Indian jails. The statute can be stretched to include employment of the labor of tribal social workers, counselors, and therapists. However, the lack of statutory guidelines and the complete discretion of the BIA in deciding whether or not to contract leave something to be desired.

Much more detailed statutory authority for BIA contracts with tribal governments can be found in the newly-enacted S. 1017, a more detailed discussion of which can be found in Section V. As far as is known, this statute has not yet been implemented.

The third statute dealing with BIA contracts is 25 U.S.C. § 452, which provides as follows:

> The Secretary of the Interior is authorized, in his discretion, to enter into a contract or contracts with any State or Territory, or political subdivision thereof, or with any State university, college, or school, or with any appropriate State or private corporation, agency, or institution, for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State orTerritory, through the agencies of the State or Territory or of the corporations and organizations hereinbefore named, and to expend

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[127] 25 U.S.C. § 47.

> under such contract or contracts, moneys appropriated by Congress for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory.

The regulations implementing this statute[128] spell out the procedures for but not the subject matter of these contracts. There is not even a parallel provision to the Title IV-A limitations on delegation of discretionary authority. The only major limitation pertinent to this study is that:

> Standards of aid, care, and service rendered to the Indians under the contracts shall not be less than those standards maintained by the State for other clients requiring similar aid, care and services.[129]

There is nothing in the statute which requires the BIA to rely on state standards. Nor is there anything in either the statute or the regulations to guide the BIA in determining the limits on its discretion.

The Development of the Public Agency Concept

Frequently, federal or state grant programs designed for economic development, law and order or social services programs are drafted in such a manner as to make it unclear whether Indian tribes are to be considered as potential recipients. In particular, for the purposes of such programs, the question posed often is whether the intent of the legislature was to subsume Indian tribes under such terms as "political subdivision," "local agency," or "unit of local government." The failure to specifically include Indian tribes may represent legislative oversight; if so, this is a product of the fact that Indians do not represent a large political constituency and legislators tend to think in terms of the federal government, states, counties, municipalities and towns in the process of the drafting and passage of bills.

The failure to specify and include Indian tribes inevitably results in confusion and delay when the question is posed whether

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[128] 25 C.F.R. Part 21.

[129] 25 C.F.R. § 21.4.

tribes may receive such governmental funds or become involved in such governmental programs. In governmental agencies, a pattern over a period of years sometimes develops: separate administrative interpretations are made that tribes are qualified; then a central administrative interpretation follows; and eventually regulatory or statutory language is added to conclusively resolve the issue.

In the instance of HEW's child welfare programs, the pattern followed conforms to the description above. Unfortunately, the problem has proved a bothersome sticking point in permitting Indian tribes to contract with single state agencies. Now, after years of confusion, there are strong indications that this issue is on the track to resolution are becoming by the introduction of central administrative interpretation and regulatory language.[130]

In broader perspective, the development of the concept of the tribe as a public agency entitled to federal and state funds is part of the dramatically changing relationship of INdian tribes to governmental, particular federal governmental, agencies. A history of that change follows.

Initially, Indian tribes looked solely toward the Commissioner of Indian Affairs for federal programs directed toward them; the office of the Commissioner was established as early as 1832.[131] On the reservation level, the Commissioner's local representative, the agency superintendent, was the authority for governmental intent and programs. And within the wide latitude permitted by the Snyder Act, passed in 1864, the Bureau of Indian Affairs had full discretion to implement programs toward Indians in almost any area of government.

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[130] An excellent explanation of this process can be found in Schifler, Trends in Federal Indian Administration, 15 So. Dak. L. Rev. 1 (1970), from which much of this material is adapted.

[131] Act of July 9, 1832, Ch. 174, 4 Stat. 564. See 25 U.S.C. § 2 for current provisions.

Not until 1935 did the first intrusion upon the Bureau's exclusive administrative authority over Indians occur: the passage of the Social Security Act, designed to cover Indians and Indian reservations. In 1936, the Indian Reorganization Act (also known as the Wheeler-Howard Act) authorized the creation of entities of tribal governent, thus creating administrative authorities subject only to limited review, or no review at all, of the Bureau. Section 10 of the Act, which created an Indian Revolving Loan Fund for economic development, was one of the first instances of a policy of direct funding by the federal government to tribal corporations.[132]

In 1954, the Bureau of Indian Affairs was divested of its program of medical services by Congress and the program was transferred to the United States Public Health Service.[133] The impetus for this change lay in the fact that the Indian Bureau found it difficult to recruit medical personnel; the Public Health Service seemed more suited to the job. The result, however, represented a more fundamental change:

> . . . the transfer was another nail driven in the coffin of the Indian Bureau's dominance of the reservation scene. In place of the monolithic BIA reservation power structure, there were now two Federal agencies, independent of each other, on the reservation: the Indian Bureau and the U. S. Public Health Service. To Indian Tribal delegations visiting Washington, this change was symbolized by the fact that they now had two major stopping points, the office of the Commissioner of Indian Affairs in the Interior Department and the office of the Director of the Division of Indian Health in the Department of Health, Education and Welfare.[134]

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[132] 25 U.S. §§ 461, 470 creates . . . a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may proscribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members . . . .

[133] Act of Aug. 5, 1954, Ch. 658, 68 Stat. 674, as amended 42 U.S.C. §§ 2001-2004(a) (1964).

[134] Schifler, supra, at 6-7.

Indian tribes had been fearful that the proposed transfer was a step toward termination and had opposed it. But their fears proved unfounded. In addition, one of the most striking results of the transfer was an immediate two-fold, 21 million dollar increase in the amount of money appropriated to Indian health, followed by significant additional increases in the years thereafter.[135]

In the 1960's, the trend toward governmental programs other than those of BIA designed for Indians increased markedly. During the presidential campaign of 1960, both John F. Kennedy and Richard Nixon committed themselves to Indian reservation development. In quick succession, after Kennedy's election, the following changes occurred.

The chief counsel of the Public Housing Administration, as an agency created by the United States Housing Act of 1937,[136] determined that the statutory language "any state, county, municipality, or other governmental entity or public body" (our emphasis) included Indian tribes. On September 22, 1961, as a result of

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[135]During the five years immediately preceding the transfer the Congress appropriated the following sums for Indian Health:

F.Y. 1951	$12,477,418
1952	13,344,765
1953	16,144,765
1954	16,100,000
1955	17,754,555

See Health Services for American Indians, supra note 22 at 249.

During the five years immediately succeeding the transfer the Congress appropriated the following sums for Indian Health:

F.Y. 1956	$38,840,000
1957	46,887,000
1958	43,196,000
1959	44,597,000
1960	50,037,000

See Act of Aug. 1, 1955, Ch. 437, 69 Stat. 397; Act of June 29, 1956, ch. 477, 70 Stat. 210; Act of Aug. 1, 1958, Pub. L. No. 85-530, 72 Stat. 458; Act of Aug. 14, 1959, Pub. L. 86-158, 73 Stat. 34.

[136]Act of Sept. 1, 1937, ch. 896, 50 Stat. 888 (codified at 42 U.S.C. § 1401 et seq. (1964).

this interpretation, the first federal loan to an Indian public housing authority was made.[137] Subsequently, in 1968, the Act itself was amended to specifically include "Indian areas" within its purpose section.[138]

In addition, in 1964, Indian reservations were permitted by statute to obtain planning grants through their respective states from the Department of Housing and Urban Development;[139] and in 1969 the first Indian-sponsored moderate-income housing project was completed under Se. 221(d)(3) of the National Housing Act.[140]

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[137] "The formal action was contained in a memorandum from the Commissioner of Indian Affairs to the Secretary of the Interior, Sept. 19, 1961 recommending approval of the Oglala Sioux Tribe's Housing ordinance and Preliminary Loan Contract. Approval was granted on September 22, 1961." Schifler, supra, p. 11, n. 34.

[138] Pub. L. 90-448, § 206(a), 1968 amendment: See 42 U.S.C. § 1401 where the purpose of the Act received an additional phrase "and Indian areas" so as to read, " . . . to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income in urban, rural non-farm, and Indian areas . . . ." (our emphasis). See also 42 U.S.C. § 1410(a).

[139] 40 U.S.C. § 461(a)(1(D) reads:

> (a) . . . the Secretary is authorized to make planning grants to . . .
>
> (1) state planning agencies for the provision of planning assistance to . . .
>
> (D) Indian reservations; . . .

[140] 12 U.S.C. § 1715 (6)(d)(3), Act of June 27, 1934, ch. 847, Title II, § 221 as added Act of Aug. 2, 1954, ch. 649, 68 Stat. 599. In 1961, Subsec. (d)(3) was amended to include "a public body or agency" as eligible mortgagor. Pub. L. No. 87-70, § 101(a)(6). The section now reads:

> (d) To be eligible for insurance under this section, a mortgage shall
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> (3) if executed by a mortgagor which is a public body or agency . . . a cooperative . . . or a private non-profit corporation or association or other mortgagor approved by the Secretary and regulated under Federal or State or by political subdivisions of states, agencies thereof, or by the Secretary under a regulatory agreement . . . .

Presumably, the Indian-sponsored project would have qualified as mortgagor under "public body or agency" or other mortgagor regulated "by political subdivisions of States" or by the Secretary . . . .

In May 1961 the Area Redevelopment Act was passed.[141] This Act--previously called the Depressed Areas Bill--had passed the 85th Congress and the 86th but was vetoed by President Eisenhower both times. As the result of pressure from the Montana delegation, bills were replete with references to Indian tribes, and the references were ultimately incorporated into the Area Redevelopment Act,[142] so that a "redevelopment area" specifically included Indian reservations.

In 1962, Congress passed the Public Works Acceleration Act.[143] Within a month, the Act was amended in a measure sponsored by Sen. Lee Metcalf of Montana to specifically include Indian tribes.[144] In one place, the phrase "and Indian tribes" was added as a permitted federal debtor; in another an Indian tribe was subsumed under the term "smaller municipality."[145]

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[141] Act of May 1, 1961, Pub. L. No. 87-27, 75 Stat. 47; provisions now covered by Pub. L. No. 89-136.

[142] The present surviving section of the Act, Pub. L. No. 89-136, 42 U.S.C. § 3161(a)(3), reads:

> (a) The Secretary shall designate as "redevelopment area" . . .
>
> (3) Those additional Federal or State Indian reservations or trust or restricted Indian-owned land areas which the Secretary of Interior or an appropriate state agency, determines manifest the greatest degree of economic distress on the basis of unemployment and income statistics and other appropriate evidence of economic underdevelopment; . . . "

[143] Act of Sept. 14, 1962, Pub. L. No. 87-658, 76 Stat. 541.

[144] Act of Oct. 15, 1962, Pub. L. No. 87-808 § 2, 76 Stat. 920, 42 U.S.C. § 1492.

[145] 42 U.S.C. § 1492(a)1 reads:

> (a) The Secretary of Housing and Urban Development is authorized (1) to purchase the securities and obligations of, or to make loans to, municipalities and other political subdivisions and instrumentalities of one or more states (including public agencies and instrumentalities of one or more municipalities or other political subdivisions of one or more state); and Indian tribes.
>
> . . .
>
> (c) As used in this section, a "smaller municipality" means an incorporated or unincorporated, or other political subdivision of a state, which had a population of less than ten thousand inhabitants at the time of the last Federal census, or an Indian tribe.

The Economic Opportunity Act, embodying the war on poverty programs, authorized grants to community action programs set up by Indian tribes and Neighborhood Youth Corps.[146] The dramatic effect of the new legal services programs, located on or near the reservations, on the whole complexion of Indian law has already been discussed. For the CAP program, Indian tribes are now specifically subsumed under terms such as "public agency,"[147] "community,"[148] and "political subdivision of a state."[149]

Indian tribes are now eligible for grants from the Department of Justice under the Juvenile Delinquency Prevention and Control Act where they are subsumed specifically under the term "public agency."[150] By a 1971 amendment, Indian tribes are included under the term "unit of general local government," permitting them to obtain grants from the Omnibus Crime Control and Safe Streets Act.[151]

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[146] Pub. L. No. 88-452, 78 Stat. 508, § 112 and § 205(a). 42 U.S.C. §§ 2723 and 2785. Since eliminated by Pub. L. No. 90-222 § 1104, 81 Stat. 691 (1967). See 42 U.S.C. §§ 2781, 2790, 2797, 2808-2812, 2823-2825, 2832-2837.

[147] 42 U.S.C. § 2790(a).

[148] 42 U.S.C. § 2790(c) reads:

> For the purpose of this subchapter, a community may be a city, county, multicity, or multicounty unit, an Indian reservation or a neighborhood or other area . . . .

[149] 42 U.S.C. § 2790(f) reads:

> For the purpose of this subsection, a tribal government of an Indian reservation is deemed to be a political subdivision of a state.

[150] Pub. L. No. 90-445 § 410, 42 U.S.C. § 3890; now 42 U.S.C. § 3891(2) by Pub. L. No. 92-381 § 3. The language reads:

> (2) The term "public agency" means a duly elected political body or a subdivision thereof and shall not be construed to mean the Office of Economic Opportunity. Such term includes an Indian tribe.

[151] Pub. L. No. 90-351 (1968); 42 U.S.C. § 3781(d) which now reads:

> . . . "unit of general local government" means any city, county, township, town, borough, paush, village, or other general political subdivision of a state, an Indian tribe which performs law enforcement functions as determined by the Secretary of the Interior. . .

Despite the developing historical pattern described above and despite the fact that certain federal agencies, by administrative ruling, regulations or statutes, have specifically included Indian tribes as potential recipients of federal programs, as a general proposition the situation today is uncertain and confused. In 1968, President Johnson created in the office of the Vice President, a new National Council on Indian Opportunity, whose responsibility it is to coordinate Federal activities in the Indian field.[152] In February 1974, the Council issued a report, and among its conclusions were:

> 6. Only 86 domestic assistance programs (14%) from a potential universe of 600 are presently being utilized by federally recognized Indian tribes. Of the 86 programs in which Indian tribes are participating, only 43 of these programs (50%) were utilized by more than one tribe.
>
> 7. There is no organized, positive, affirmative federal effort to, on a thrust basis, create an awareness of potential, and generate extensive utilization of available federal domestic assistance programs to improve tribal economic and social status.
>
> 8. There is no basic reference tool designed for use by Indian tribes to help them in targeting in on potentially useful federal domestic assistance programs and to equip them to successfully compete for federal assistance dollars.[153]

In pin-pointing particular problems, the NCIO mentioned the "public agency" problem, in the following language:

> One of the problems faced by Indian tribes when applying for assistance under Federal progrmas is the lack of consistancy in the way tribes are viewed by the various government agencies. A tribe meeting the legislative requirements for one agency'a program may be precluded for participating in another agency's program--with the same legislative requirements--due to different statutory interpretation by the administering agency. For example: the Civil Service Commission precludes Indian tribes from participating in their State Personnel Merit System Technical Assistance and Intergovernmental Personnel Grants Programs. The legislation dealing with these

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[152] See 33 Fed. Reg. 4245 (1968).

[153] "Inventory and Analysis of Indian Tribal Participation in Federal Domestic Assistance Programs," p. 4.

> programs (the Intergovernmental Personnel Act) has been interpreted by the Civil Service Commission General Counsel as not including Indian tribes as "units of local government". The Department of Health, Education and Welfare precludes tribes from participating in their Educational Personnel Training Grants--Career Opportunities Program because they do not recognize Indian tribal schools as "local educational agencies". Conversely, the Department of Justice (LEAA) considers Indian tribes to be "units of local government" but has provided assistance to them basically through single state agencies pursuing law enforcement assistance programs. The Department of Transportation (FAA) considers Indian tribes to be "units of local government" and has provided assistance to them under their Airport Development Aid Program.[154]

In addition, the report commented upon the adequacy of the Catalog of Federal Domestic Assistance for tribal purposes:

> [The tribes] pointed out that the catalog was written to serve a city, county or state governmental unit. In most instances requirements did not extend any consideration to the unique position of Indian tribes . . . . It became evident . . . that some effort should be made to develop a substitute or better yet--a reference tool designed exclusively for the use of Indian tribes.[155]

HEW Regional attorneys in Region VIII and IX have on two separate occasions determined that Indian tribes are to be considered public agencies within the meaning of the Social Security Act. In the instance of Region IX, the Regional ATtorneys Opinion contained a statement that the Human Resources Division of the office of General Counsel "concurs in these conclusions."[156]

The Region IX Attorney's opinion of November 12, 1973, was titled: "Consideration of Navajo Tribal Funds as Public Funds." This opinion was in response to the request of the Associate Regional Commissioner, Region IX, as to whether federal funds could go directly to the Navajo Tribe, as public agency within the meaning of Titles IV-A and VI, in implementing the Navajo Social Services Demonstration Project. Among the authorities used for the decision were:

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[154] Ibid., at p. 32.

[155] Ibid., at pp. 34-35.

[156] fn. 6, Regional Attorney IX Opinion "Consideration of Navajo Tribal Funds as Public Funds," Nov. 12, 1973.

1. Handbook of Federal Indian Law (U.N.M. 1971), p. 122

> [p]erhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished (emphasis is that of the author)

Also cited M. Price, Native American Law Manual, pp. 422-423 (1970) (acting 55 I.D. 14)

2. By analogy: The Federal State Revenue Sharing Act, P. L. 92-512, section 103(d)(1) where this definition appears:

> The term "unit of local government" means the government of a county, municipality, township, or other unit of government below the state which is a unit of general government (determined on the basis of the same principles used by the Bureau of the Census for general statistical purposes.) Such term also means . . . the recognized governing body of an Indian tribe or Alaskan native village which performs substantial governmental functions.

3. By analogy: The Older Americans Comprehensive Services Amendments of 1973, P. L. 93-39, Section 302(2)

> For purposes of . . . [Title III--Grants for State and Community Programs on Aging]--
>
> The term "unit of general purpose local government" means (A) a political subdivision of the State whose authority is broad and general and is not limited to only one function or a combination of related functions, or (B) an Indian tribal organization.

The decision concluded " . . . in view of the recognized principle that Indian tribes exercising substantial governmental functions independent of a state possess the attributes of a limited sovereignty, and in light of the above referenced Congressional mandates directing the Secretaries of certain federal agencies under specified circumstances to recognize the governing body of an Indian tribe as a 'unit of local government' (i.e., a public agency), . . . [it follows that] . . . Tribal funds could be considered public funds for purposes of federal financial participation under Titles IV-A and VI of the Social Security Act."

The Region VIII Attorney's Memorandum, Memo 74-132, October 31, 1974, was entitled "Status of Indian Tribal Governments as Public Entities." Approximately a year later, Region VIII's Attorney issued a memorandum containing a compilation of HEW

authorities in response to a request from the Deputy Regional Commissioner, SRS, to support the proposition that "legally contracted Indian tribal governments, courts, and other authorities are in fact public bodies and not private organizations." Among the authorities cited were:

1. Memorandum to General Counsel Files -- SRS Division, Jan. 11, 1971 "Foster Grandparents Program -- BIA Facilities as Source of Matching Share" by John P. Fanning

In the process of rendering an opinion on the BIA as source of matching share, the memorandum contrasted the BIA with Indian tribes, stating: "Tribes are local government agencies. Money appropriated for them from the Indian trust fund is their money, and is used 'for expenses of tribal attorneys, establishment and operation of tribal enterprises, investments and the welfare of Indians." (Budget of the United States, 1971, Appendix 552) The tribes, like the District of Columbia, are governmental entities distinct from the United States, and money appropriated to them by the Congress does not have a Federal character for the purposes of matching."

2. Memorandum to Regional Commissioner, SRS, from Regional Attorney VIII, "SRS -- North Dakota -- Family and Children's Services for Indians" December 17, 1971, Memo #71-08

In the process of reviewing a draft letter to the Director of North Dakota's Department of Social Services the Regional Attorney suggested these additions:

> ". . . an organized Indian tribe has, by virtue of its inherent sovereignty, the power to regulate foster homes within its jurisdiction."

and

> ". . . North Dakota could meet its Title IV responsibilities in providing foster care and services by contractual agreements with the governments of the various tribes."

Authority for the first proposition was Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation[157] and Federal Indian Law, United States Department of Interior at page 395.

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[157] 231 F. 2d 89 (Eighth Cir. 1956).

The "public agency" problem is not confined solely to the federal government and federal statutory interpretation issues. It comes up as well when a state agency wishes to contract with an Indian tribe. For example, the Navajo Social Services project (discussed in detail in Section V) was in jeopardy until an Arizona statute was passed which permitted the state umbrella public welfare agency to contract with an Indian tribal council, where the council was defined as a "public agency". Two examples of state inclusion of an Indian tribe under the "public agency" rubric for the purposes of state intragovernmental contracting follow.

In February 1974, a special statute was passed in South Dakota to include "any Indian tribe" within the term "public agency" of a new state provision permitting intra and intergovernmental contracting. The statute read:

> For the purposes of this chapter, unless the context otherwise requires, the term
>
> (1) "Public agency" means any county, municipality, township, school district, conservancy subdistrict or drainage district of the state of South Dakota, any agency of South Dakota state government or of the United States; any political subdivision of another adjacent state; and any Indian tribe.[158]

In 1974, a new Arizona provision, also one permitting intragovernmental contracting, was passed which read in part:

> For the purposes of this article, the term "public agency" shall include . . . Indian tribal council . . . 11-951 Ariz. Rev. Statutes; 1974-1975 Cum. Pocket Supplement.

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[158]South Dakota Compiled Laws, 1967;1974 Cum. Pocket Supplement. Ch. 13, S. L. 1974 approved February 20, 1974; adding "and any Indian tribe."

IV. BASIC LEGAL PROBLEMS

Structure of SRS Programs

This section analyzes the specific types of legal and jurisdictional problems that have arisen in the administration of the SRS programs studied in this report on Indian reservations. In addition, it examines two states--Arizona and North Dakota--for concrete examples of these problems and for the attempts at their resolution. First, however, it is useful to review the principles underlying the general conflict between the structure of SRS programs and the limited jurisdiction of state governments on Indian reservations.

As explained in the previous section, the general structure of SRS programs is one of state administration or supervision of assistance and services, with the federal government providing financial assistance. Further, federal statutes and regulations limit the discretion of state and local agencies through a variety of requirements which must be followed by those states which have elected to participate in these programs. One of these requirements is that the state's program must be administered or supervised (if the actual administration is the responsibility of county governments) by a single state agency. Another requirement is that the state's programs must be provided on a state-wide basis. Underlying the statewideness requirement is the constitutional principle of equal protection, which prohibits a state from treating one group of people differently from another unless this difference is justifiable--a very difficult burden for the state to meet if the discrimination is along racial or ethnic lines.

The Limited Jurisdiction of State Governments on Reservations

This summary of the structure of SRS programs makes it clear the programs were designed for administration by each state comprehensively within its borders. However, as discussed in the first section of this report, Indian tribes are a governing body unto themselves, and possess many of the attributes of sovereignty,

including the choice of form of government, the election of tribal leaders, the establishment of tribal court systems, the regulation of conduct among tribal members, and the administration of tribal government within the limits of the reservation. The potential for jurisdictional conflict between states and tribal governments is clear.

To discuss this potential jurisdictional conflict with clarity requires consideration of three major issues:

(1) the definition of an Indian

(2) the definition of Indian country--
the geographical limits of controlling Indian law

(3) the impact of P. L. 280.

For our purposes, the first issue--who is an Indian--may be discussed rather briefly, as most of the tribal-state conflicts affecting the delivery of child welfare services to Indians do not turn on the question of whether a person is an Indian or not.

Tribes have the power to prescribe qualifications for membership, and the federal Congress may also define the characteristics of members of a tribe.[1]

The question has been addressed many times by Congress, federal agencies, and the courts, with differing definitions resulting. The Indian Reorganization Act[2] contains the following definition:

> All persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of such members who were, on June first, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood . . . .[3]

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[1] Stephens v. Cherokee Nation, 174 U. S. 445 (1899).

[2] 25 U.S.C.A. §461, enacted in 1934.

[3] 25 U.S.C.A. §479.

The general federal statute providing for contracts regarding Indian education[4] has been interpreted through federal regulations as providing for:

> . . . the education of Indian children of one-fourth or more degree (of) Indian blood . . .[5]

Many recent federal statutes and regulations and cases tend toward a broad definition. For example, Section 4 of the 1975 Indian Self Determination Act says "Indian means a person who is a member of an Indian tribe."

The federal regulations for the 1972 Indian Elementary and Secondary School Assistance Act[6] contains the following definition:

> Any individual living on or off a reservation, who: (a) is a member of a tribe, and/or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendent in the first or second degree of any such member, or (b) is considered by the Secretary of the Interior to be an Indian for any purpose . . .[7]

Finally, the present regulations of the Indian Health Services describing the class for which treatment is available state:

> (1) Services will be made available . . . to persons of Indian descent belonging to the Indian community served by the local facility . . . (2) Generally, an individual can be regarded as within the scope of the Indian health and medical services program if he is regarded as Indian by the community in which he lives . . .[8]

A more difficult, and more significant, issue for the purposes of our study is the question of defining "Indian Country," the term long used to loosely define the geographical confines of Indian authority within reservations. The outline of tribal Indian

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[4] 25 U.S.C.A. §§452-456.

[5] 25 C.F.R. §33.4.

[6] 20 U.S.C.A. §§241aa-ff.

[7] 45 C.F.R. §186.2.

[8] 42 C.F.R. §36.12(a).

jurisdictional authority varies according to the issue involved as a function of the relevant treaties and the statutory legislative history.

To start with a relatively clear example, we have previously mentioned the Major Crimes Act of 1885, giving federal courts exclusive jurisdiction over certain offenses committed between Indians on reservation lands. For this purpose, federal law contains the following definition:

> . . . the term Indian Country, as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, not withstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependant Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian title to which has not been extinguished, including rights-of-way running through the same.[9]

Let us next turn to the polar extreme and examine the difficulties attendant in resolving the question of the geographical limits of tribal Indian authority in the most recent United States Supreme Court Case addressing the issue, DeCoteau v. District Court.[10] The narrow question was the authority of South Dakota state courts to order placement of Indian children in foster homes, and to exert criminal jurisdiction over Indians for acts committed on lands within the confines of a reservation.

The issue therefore turned on the original establishment and subsequent modifications in status of the Lahe-Tranesse Indian Reservation of the Sisseton and Wahpeton Sioux Indians. In both cases acts committed by tribal members occurred on lands within the borders of a reservation originally created by treaty in 1867, but owned and settled by non-Indians since 1891 when by federal law the United States purchased about 85% of the original reservation acreage and then opened it to settlement by non-Indians.

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[9] 18 U.S.C. §1151.

[10] 95 S. Ct. 1082 (1975).

The result was a random pattern of parcels of land held by Indians in trust allotments scattered among lands held by non-Indians, all within the confines of an original reservation--the "checker board jurisdiction" issue writ large.

To answer the question of whether state court jurisdiction could be predicated on acts committed by Indians on the non-Indian owned land within the confines of the original reservation, it was necessary to determine if the reservation status of original area had been terminated. If not, then jurisdiction over Indians for acts within the area remained in tribal or federal courts, according to the "Indian Country" statute previously mentioned. The Supreme Court took these cases because the Supreme Court of South Dakota and United States Court of Appeals, Eighth Circuit, reached opposite results in resolving the question.[11]

After examining the provisions of the original treaty, the detailed legislative history of the subsequent act of Congress purchasing the land from the tribes (including contemporaneous newspaper reports and reports of the Commissioner of Indian Affairs to Congress), other contemporaneous acts of Congress dealing with other tribes, the written agreement and recorded comments of tribal and federal government spokesmen during the negotiations leading to the agreement, and Supreme Court precedent, the court concluded--with three justices dissenting--that the original reservation status had been terminated and jurisdiction properly belonged in the state courts.

The DeCouteau case merits mention not so much for its precedential value, which is limited to its facts, but because it shows the necessity to examine treaties, federal laws, legislative history and court precedent before answering the question of whether state or tribal authority will control in any given case. Indeed, even if the existence, or non-existence, of reservation status can be

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[11] See DeCouteau v. District County Court, 211 N. W. 2d 843 (So. Dak. 1973), and United States ex rel Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973).

determined, one must then consider another factor, the balancing test suggested by the United States Supreme Court in Williams v. Lee.[12] The court there suggested that state action was invalid if it infringed on the right of reservation Indians to make their own laws and be governed by them. We have followed the course of the subsequent development of this test in Section I of this report.

We now turn to the last major consideration in an examination of the limited jurisdiction of state governments on reservation lands--the impact of P. L. 280, passed by the United States Congress in 1953.[13] It gave civil and criminal jurisdiction over essentially all Indian lands within their borders to the States of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.

It further provided that 36 other states could enact state legislation to assume either civil or criminal jurisdiction, or both, within their borders. Nevada assumed criminal and civil jurisdiction in Indian Country, with limited exceptions, in 1955.

Finally, P. L. 280 allowed the States of Washington, Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota and Utah to assume civil or criminal jurisdiction over Indian reservations within their boundaries by other procedures, generally amending their state constitutions to change provisions which disclaimed state authority over Indian owned lands within those states.

P. L. 280 denied authority to any state, however, to encumber or tax trust lands owned by Indians, or other Indian lands subject to federal restrictions against alienation, such as allotted lands.

The state response was as follows:

(1) In Arizona, the state has extended its jurisdiction only for air and water pollution laws.[14]

(2) Montana has extended criminal jurisdiction only over the Flathead Reservation, although other tribes may consent if the

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[12] 358 U. S. 217 (1959).

[13] 67 Stat. 588.

[14] A.R.S. §36-1801, 1865.

relevant county commissioners also consent, and a tribe may obtain retrocession after two years.[15]

(3) In New Mexico, a constitutional amendment to assert jurisdiction was rejected in a popular vote in 1969.

(4) North Dakota amended its constitution in 1965 and passed legislation assuming civil jurisdiction over tribes or individuals with their consent.[16] Thus far no tribe has consented, although apparently some individuals have.

(5) Oklahoma has made no effort to assume jurisdiction under P. L. 280.

(6) South Dakota submitted legislation allowing the governor to assume jurisdiction by proclamation to a referendum vote in 1965, and the proposal was defeated.

(7) Utah passed legislation in 1971 to assert civil and criminal jurisdiction, conditioned upon Indian consent.[17]

(8) Washington passed legislation in 1957 under which civil and criminal jurisdiction was asserted over nine tribes, at the request of the tribes.[18] In 1963 it asserted criminal and civil jurisdiction over all fee patent lands on reservations, with civil jurisdiction asserted over all reservation lands in the areas of school attendance, public assistance domestic relations, mental illness, juvenile delinquency, adoptions, dependent children, and traffic laws--all without the consent of the tribes.[19] The Washington response has been the most complex and the most controversial.[20]

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[15]R.C.M., 1963, §§83-801, 802, 803.

[16]N.D.C.A. §27.19.

[17]Utah Code §§63-36-9 et seq. (1971).

[18]R.C.W. §37.12.020-070.

[19]R.C.W. §37.12.010-070.

[20]See, for example, 1 Justice and the American Indian, The Impact of Public Law 280 (1974).

(9) Florida has asserted exclusive civil and criminal jurisdiction.[21]

(10) Idaho exercises civil and criminal jurisdiction with respect to school attendance, juvenile delinquency, dependent and neglected children, mental illness, domestic relations, public assistance, and motor vehicle laws.[22] Other jurisdiction may be asserted with tribal consent.

No other states have chosen to assert jurisdiction under the provisions of P. L. 280. Many others have asserted jurisdiction, particularly in the Eastern United States, on grounds of early state treaties with tribes, special federal statutes, or state establishment of reservations.

It is important to remember that the Indian Civil Rights Act of 1968 prevented further unilateral assertion of state jurisdiction over Indian Country, and that since tribal consent has been required, no further state assertion of jurisdiciton has occurred to our knowledge.

As one might expect, the complexity of P. L. 280 and the generally strong and negative response it elicited from Indian tribes has produced much litigation. Several cases have significant ramifications--though localized--for an examination of child welfare services for reservation Indians. Kennerly v. District Court[23] was the United States Supreme Court's only pronouncement to date on the adequacy of state processes in assuming jurisdiction under P. L. 280. There, Blackfeet Indian tribal members were sued in the Montana state courts for debts they contracted within the confines of the Blackfeet Reservation. The Blackfeet Tribal Council had passed an ordinance granting the state courts concurrent jurisdiction over civil matters, but the Montana legislature had never

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[21]F.S.A. §285.16 (1961).

[22]Ida. Code §67-5101.

[23]400 U. S. 423 (1971).

asserted civil jurisdiction by its own actions. The court ruled the tribe could not unilaterally give the state jurisdiction over Indian Country.

Similarly, in Black Wolf v. District Court,[24] the Montana Supreme Court held that state courts could not exercise criminal jurisdiction over Northern Cheyenne Indian children. A tribal court had attempted to transfer jurisdiction to the state court for commitment of the children to a state institution, but again the state legislature had not asserted jurisdiction over the Northern Cheyenne reservation. These two decisions have had wide-ranging impacts in Montana, since they open to question the validity of state and tribal court orders purporting to commit Indians to state institutions.

However, despite the procedural rigor required for valid assertion of state jurisdiction over Indian Country, it is clear that those states which elected to extend their jurisdiction unilaterally, during the 1953-1968 period when P. L. 280 was in full bloom, now have great powers in Indian Country--and the affected tribes correspondingly less--depending on the specific form and extent of jurisdiction chosen.

Against this backdrop, we now examine three areas of recurring jurisdictional conflict between state governments and Indian tribes: licensing of foster care and day care facilities on reservations, state recognition and enforcement of tribal court orders, and the activities of state or county social workers on Indian reservations.

State Licensing of Foster Care Homes and Day Care Facilities on Indian Reservations

One of the most persistent jurisdictional disputes involving child welfare programs on Indian reservations has been over the question of whether or not a state has the authority to license

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[24] 493 P. 2d 1293 (Mont. 1972).

foster care homes or day care facilities located within the exterior boundaries of an Indian reservation.

Several provisions of Titles IV-A and IV-B, and XX of the Social Security Act, require state licensing or approval of foster care homes or day care facilities. Under the Title IV-A program of assistance to needy children in foster care, payments may be made to or on behalf of an eligible child who has been placed in a foster family home . . . "which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing."[25] The key words here, "licensed or approved," as well as the lack of federal statutory standards, are repeated for day care services under the Title IV-B child welfare services program. A state plan for day care services must provide:

> that day care provided under the plan will be provided only in facilities (including private homes) which are licensed by the State, or approved (as meeting the standards established for such licensing) by the State agency responsible for licensing facilities of this type.[26]

This should be contrasted with the provisions in Title IV-C for child care for parents in the AFDC-WIN program. These provisions make no mention at all of licensing, approval, or standards for these day care facilities.[27]

The new Title XX, effective October 1, 1975, changes this picture somewhat.[28] Child care services in the child's home, if provided, can receive federal payments only if

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[25] 42 U.S.C. §608. This provision also applies to children placed in "child-care institutions." The requirement for licensing or approval is virtually identical to that for licensing or approval of "foster family homes."

[26] 42 U.S.C. §622(a)(1)(C)(v).

[27] 42 U.S.C. §602(a)(19)(G).

[28] Since Title XX deals only with social services, not assistance payments, the "licensing or approval" requirement for AFDC foster care assistance is unaffected by this new statute.

> the care meets standards established by the State which are reasonably in accord with recommended standards of national standard-setting organizations concerned with the home care of children,

and care outside the child's home is eligible for federal money only if the case meets the federal interagency day care requirements.[29] If a Title XX state plan provides for child day care services, it must provide:

> for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for such services which are reasonably in accord with recommended standards of national organizations concerned with standards for such services, including standards related to admission policies for facilities providing such services, safety, sanitation, and protection of civil rights.[30]

Another provision contains a requirement, virtually identical to the child day care provision just described, for services to individuals "living in institutions or foster homes."[31] These Title XX requirements, unlike Title IV-A and IV-B, do not mention state "licensing or approval," but instead require that there can be "a State authority or authorities . . . responsible for establishing and maintaining standards." It is uncertain just what effect this change in statutory language will have on the licensing dispute that has arisen under the "licensed or approved" provision. Also Title XX establishes a national benchmark for comparing the standards adopted in a state's Title XX state plan.

The licensing issue arises only for services provided on Indian reservations. In this report, the term "Indian reservations" is used as a recognizable substitute for the more technical term "Indian Country." The courts have increasingly used the definition contained in 18 U.S.C. §1151, especially subsections (a) and (c):

> [T]he term "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent,

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[29] 42 U.S.C. §2002(a)(9)(A). The federal interagency day care requirements are set forth in 45 C.F.R. Part 71.

[30] 42 U.S.C. §2003(d)(1)(G).

[31] 42 U.S.C. §2003(d)(1)(F).

> and including rights-of-way running through the reservation, . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

These subsections of §1151 establish two situations in which land is considered to be "Indian Country": (1) land within the exterior boundaries of a reservation, including land sold to non-Indians and (2) all allotted land, the Indian titles to which have not been extinguished, outside of an Indian reservation. Within an Indian reservation, all land is Indian Country, even if that reservation has been opened to settlement by non-Indians, if the Congressional intent was not to diminish the size of the reservation.[32] If land is outside the boundaries of a reservation, it may fit the §18 U.S.C. §1151(c) definition of "Indian Country" even though parcels of such land are situated in checkerboard fashion, interspersed with land as to which state law is clearly applicable.

To recapitulate: the licensing dispute has arisen with respect to Title IV-A and IV-B programs for which the Social Security Act requires the state to license or approve foster care homes or day care facilities, although no federal standards are contained in the Act. The new Title XX program may give the state more flexibility in the administration of standards--unless the words "establish and maintain standards" are interpreted as prohibiting delegation of state licensing type functions--while limiting the state's discretion as to the content of the standards. These problems arise when these services are delivered to "Indians" in "Indian Country." The sometimes ambiguous nature of these terms can lead to further confusion in borderline cases.

The state's authority to license in the foster home or day care field, legal/jurisdictional questions aside, generally derives from specific legislative enactments. These statutes are in turn

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[32] Seymour v. Superintendent, 368 U. S. 351 (1962). Three U. S. Supreme Court cases in the last thirteen years--Seymour v. Superintendent, supra; Mattz v. Arnett, 412 U. S. 481 (1973); and DeCoteau v. District Court, 95 S. Ct. 1082 (1975)--have established that an extremely careful reservation-by-reservation analysis must be made to determine this Congressional intent and, therefore, to ascertain the reservation boundaries.

supported by the state's "police power," a concept that encompasses governmental activities to protect the public safety, health, and welfare. Statutory provisions in this area generally provide for the designation of an agency responsible for administering the licensing program, with funding for inspectors and other necessary positions. These statutes can also include civil and/or criminal penalties for operation without a valid license.

It could be argued that Congress consented to state inspection of foster homes and day care facilities on Indian reservations when it passed 25 U.S.C. §231, which reads, in pertinent part:

> The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any state to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations . . . .

This statute is not "self-implementing," that is, it explicitly requires "rules and regulations" before the Secretary of the Interior can implement its provisions. The regulations,[33] which were promulgated pursuant to this statute were revoked on July 1, 1955.[34] Hence 25 U.S.C. §231 has been legally dormant for the last twenty years.

Further, the limited scope of the statute and especially the regulations[35] provide tenuous authority for state inspection of on-reservation foster homes and day care facilities in order to determine compliance with the full range of state standards.

Except for states which have assumed civil and/or criminal jurisdiction in Indian Country pursuant to P. L. 280, a state is without jurisdiction with respect to Indians living on an Indian

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[33] 25 C.F.R. §84.78 (1949).

[34] Act of August 5, 1954, 68 Stat. 674.

[35] State health laws dealing with "sanitation and quarantine regulation" are the only matters dealt with in 25 C.F.R. §84.78 (1949).

reservation or on other land which meets the definition of "Indian Country" if the exercise of state authority would infringe on the right of the Indians to govern themselves. The central question for the licensing issue, then, is whether non-P. L. 280 states have jurisdiction to license. Put differently, the question is whether the nature of the state's activities in the area of licensing is such as to constitute an invalid exercise of its civil and/or criminal jurisdiction on the reservation.

We must first ask what activities are included within the general rubric of "licensing." The first step, aside from obtaining legislative authority and establishing an administrative body for the purpose of licensing, is to establish generally applicable standards. For foster homes and day care facilities, these standards could be very similar to the "recommended standards of national organizations concerned with standards for such services," as will be required under Title XX.[36] Once these standards are established, then individual license applications can be considered.

The process of obtaining a license consists of four separate activities. First, someone must apply for a license. Second, an inspection is generally made to determine whether or not the applicant meets state standards.[37] Third, the state agency must decide to grant or reject the application, based on the inspection. And fourth, if the decision is favorable, the license must be granted.

This does not end the process, of course. Licenses are generally granted for limited periods of time and must be renewed. Also, the state may monitor the licensee through further inspections, in order to assure that the licensee meets the applicable standards.

Perhaps the most important aspect in this process is the state's enforcement power. If a licensee does not meet the standards,

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[36] 42 U.S.C. §2003(d)(F,G).

[37] A variant on this would be the case of an applicant who wishes to undertake in the future an activity which must be licensed. In that case, the inspection would follow the grant of the license.

the license can be revoked. If the licensee then continues to operate without a valid license, the state has the power to invoke sanctions. There is a broad range of penalties: criminal penalties, civil penalties (which are essentially a different variety of fines), and withholding of governmental financial assistance are the most common.

With this functional analysis of licensing in mind, the next question is what is meant by the word "jurisdiction." This term is generally used to refer to the power of a court to decide a matter brought before it. For administrative activities such as licensing, it means the analogous power of an agency to deal with matters other than its own internal administration. The concept of "jurisdiction" is not applicable to situations which the government acts solely through persuasion, without coercion. For example, the tourist promotion agency of the State of California does not exercise any "jurisdiction" by attempting to persuade citizens of the State of New York or of the Province of Toronto to spend their tourist money in California. The only way in which "jurisdiction" would be involved would be if California attempted in some way to use its governmental powers of coercion, as through a court order and enforcement of that order.

Thus a state agency is not exercising jurisdiction when it establishes standards, or receives an application for a license, or inspects, or determines whether a license should be granted and grants it, so long as its relationship to the applicant or the licensee is purely voluntary. If the applicant refuses to allow an inspection or operates without a license, however, and the state then seeks to impose sanctions for these acts, the exercise of jurisdiction is involved.

Before examining these sanctions, another matter associated with the state's power to inspect on a reservation should be discussed. This matter can be stated as follows: even if an on-reservation Indian applicant consents to a state inspection of

his land, can the tribe refuse to permit the state inspector to enter onto the reservation? The quick answer is that treaty provisions reserving to a tribe the power to provide for the admission of nonmembers onto that tribe's reservation authorize the tribe to exclude a nonmember from the reservation.[38] However, this must immediately be qualified by the prohibition against arbitrary action by a tribe. In Dodge v. Nakai,[39] the Navajo Tribe asserted that it had the power to exclude a nonmember (the director of the OEO-funded legal services organization on the reservation) on the ground that his raucous laughter at a tribal council meeting had disrupted the meeting and shown disrespect for the tribe. The federal district court, applying the general substantive due process principle that governmental action is valid only if reasonably related to a legitimate governmental purpose, held that the alleged misconduct of this nonmember did not justify the severe penalty of exclusion. Thus if a tribe wanted to exclude a state inspector from the reservation under its treaty provisions, it could do so only if it could justify its actions as being in furtherance of a substantial and "legitimate" governmental interest.

It is clear that state imposition of civil or criminal penalties for events occurring on the reservation would be an exercise of state jurisdiction, especially if the applicant or licensee were an Indian. It would impinge on tribal self-government, since at least two older cases have held that tribal self-government includes the power to license and impose license taxes on non-Indians engaged in business on the reservation.[40] And the United States Supreme Court has recently held that the U. S. Department of

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[38] Dodge v. Nakai, 298 F.Supp. 26 (D. Ariz. 1968); Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553 (8th Cir. 1958), cert. denied 358 U. S. 932 (1959).

[39] Supra.

[40] Buster v. Wright, 135 F. 947, (8th Cir. 1905), appeal dismissed 203 U. S. 599 (1906); Zevely v. Weimer, 5 Indian Terr. 646, 82 S.W. 941 (1904).

the Interior could validly delegate to Indian tribal governments its power, derived from federal statute, to license non-Indians selling liquor in Indian Country.[41]

However, a federal case involving a non-Indian land development within the boundaries of Indian pueblo land in New Mexico held that state statutes concerning liquor licensing, construction licenses, land platting and subdividing, and water quality could be applied to non-Indians on the pueblo.[42] The pueblo government had entered into a 99-year lease, approved by the Secretary of the Interior, with a non-Indian land development company. The nearby city of Santa Fe attempted to impose its planning and platting authority and subdivision control over this land. The New Mexico Supreme Court, in Sangre de Cristo Development Corp., Inc. v. City of Santa Fe,[43] held that the city's efforts would not interfere with the pueblo's self-government, but were nevertheless preempted by a regulations promulgated by the Secretary of the Interior. In Norvell, this regulation was challenged directly and held invalid. However, at least part of the court's opinion in Norvell--that the pueblo was without power, delegated to them by the federal government, to license liquor sales by non-Indians, was overruled sub silentio by the U. S. Supreme Court in United States v. Mazurie.[44] Still, there is still some authority for state licensing of non-Indian activities, presumably including those in the child welfare field, on the reservation.

If the state limits its sanctions to the withholding of Title IV-A funds, there may not be any invalid exercise of state jurisdiction on the reservation. In fact, this is all that the Social Security Act requires--that federal money not be expended in homes or institutions not "licensed or approved" by the state.

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[41] United States v. Mazurie, 95 S. Ct. 710 (1975).

[42] Norvell v. Sangre de Cristo Development Co., Inc., 372 F.Supp. 348 (D. N. Mex. 1974).

[43] 84 N. M. 343, 503 P.2d 323 (1972).

[44] Supra, note 41.

It is uncertain whether a state, consistent with the equal protection clause of the Fourteenth Amendment to the United States Constitution, could thus limit its sanctions for on-reservation homes or institutions and impose its full range of sanctions off the reservation.[45]

No definitive answer, then, can be given to the question of whether state licensing on a reservation is valid. If all the activities, from application to inspection to compliance, are voluntary, it can be argued that there is no jurisdictional problem. If the tribe attempts to exclude state inspectors, the matter can be litigated. And if the only sanctions imposed by the state for non-compliance in a particular case are withholding of funds, arguably no state jurisdiction has been exercised. However, the state may be required to go beyond such sanctions in order to prevent off-reservation licensees from using an equal protection defense. This could raise serious jurisdictional problems.

One might think that in states which have assumed jurisdiction over Indian Country pursuant to P. L. 280, all these problems would be washed away. This is not quite true. There is a dispute as to whether local zoning regulations apply to Indian trust land in P. L. 280 states. The Washington Supreme Court, in Snohomish County v. Seattle Disposal Co.,[46] held that since P. L. 280 does not "authorize the alienation, encumbrance, or taxation" of any trust

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[45]As explained in Section III of this report, differential treatment by a state of otherwise similarly-situated persons can be justified if one of two conditions is met: (a) the differential treatment is based on a "compelling state interest" if the distinction is based on a "suspect category" such as race or residence or if the subject matter of the dispute involves a fundamental right such as the right to vote, or (b) the differential treatment is rationally related to a legitimate state interest (a much less stringent test) in all other cases. Assuming that the more stringent "compelling state interest" test is applied, a state could argue that it is not applying its full range of sanctions to Indian licensees on a reservation because it lacks the jurisdiction to do so, and must rely on federal or tribal enforcement. Since this question has not been litigated, it is uncertain whether the courts would accept this argument.

[46]70 Wash. 2d 668, 425 P.2d 22 (1967), cert. denied 389 U. S. 1016 (1968).

property and since this zoning ordinance was an "encumbrance" as it diminished the value of the land, the application of this zoning ordinance was not authorized by P. L. 280.

The opposite conclusion was reached in Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs,[47] in which a city zoning ordinance was held not to be an "encumbrance" on trust land, and in People v. Rhoades,[48] involving a state requirement of a firebreak around buildings in certain circumstances.[49]

On the authority of the Snohomish County case, the United States Department of the Interior issued an unpublished Solicitor's opinion[50] on the applicability of health and sanitation laws of the State of California (a P. L. 280 state) on Indian reservations. This opinion drew a distinction between enforcement of state health and sanitation laws which operated "upon the person" of an Indian, and enforcement which, "directly or indirectly, would impact or involve the regulation of trust property in any significant way." It concluded:

> We perceive no impediment to a state health officer's entry upon trust land [in a P. L. 280 state] for the purpose of enforcing a state law against the person of an Indian. But such officer would be without authority to enter for the purpose of taking action which would interfere with the use or possession of trust land or other trust property.

If this distinction is correct, then even in a P. L. 280 state, state civil or criminal enforcement of its licensing standards for foster homes or day care facilities would be invalid as an interference with the use of trust land. But if cases such as Agua Caliente Band are correct, then a P. L. 280 state has jurisdiction. This question must also be considered unresolved.

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[47] 347 F.Supp. 42 (C. D. Cal. 1972).

[48] 12 Cal. App. 3d 720, 90 Cal. Rptr. 794 (1970).

[49] Cf. Rincon Band of Mission Indians v. County of San Diego, 324, F.Supp. 371 (S. D. Cal. 1971), appeal dismissed for want of jurisdiction 495 F.2d 1 (9th Cir. 1974), cert. denied 95 S. Ct. 328 (1975) (county gambling ordinance not an "encumbrance").

[50] M-36736 (Feb. 7, 1969).

One solution to this confusion of jurisdictional problems is the "Affidavit of Standard Compliance in Lieu of License" now in use in North Dakota. A more detailed discussion of this particular solution can be found below in this section. This approach essentially consists of BIA or tribal inspection of a day care facility, certification by the inspecting agency that this facility complies with the Federal Interagency Day Care Requirements and state day care standards, and formal approval by the state agency. The legal authority for this approach can be found in two sources:

--The licensing requirements in the Social Security Act provide that the facility must be "licensed or approved" by the state. The term "approved" was interpreted to support this approach, in which state approval is actually only a formal requirement after the actual inspection, decision, and enforcement have been performed by or placed in the hands of other agencies.

--Federal regulations provide that a state may "purchase services" from "other State or local public agencies, from nonprofit or proprietary private agencies or organizations or from individuals."[51] A more detailed description of this regulation is contained in Section III of this report. Even if this practice is within the scope of this regulation, however, it is subject to challenge as being a delegation, by the state agency, "to other than its own officials [of] its authority for exercising administrative discretion in the administration or supervision of the [state] plan."[52]

The legal uncertainties raised by the licensing issue and the state "approval" approach suggest that patchwork alterations in the current structure of SRS programs may not be sufficient, and that legislative changes may be needed in order to resolve this and similar jurisdictional issues.

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[51] 45 C.F.R. §226.1(a).

[52] 45 C.F.R. §205.100(c)(1).

State Recognition and Enforcement of Tribal Court Orders

Another area of legal and jurisdictional problems in the delivery of SRS programs to Indians on reservations is the recognition and enforcement of tribal court orders by state courts and agencies. This is critical because the adjudication of a child's dependent or neglected status may lead to foster care or adoptive placement off the reservation and may qualify the child for AFDC foster care assistance benefits.

As explained in Section II, many Indian tribes have established their own tribal courts. These courts, where they exist, replace the federally established courts of Indian offenses, the validity of which was recognized in United States v. Clapox.[53] Tribal courts have jurisdiction over all matters not taken over by the federal government.[54] The federal government has taken jurisdiction over offenses included in the Major Crimes Act,[55] and has limited the punitive power of tribal courts for any criminal offense to imposing no more than six months' imprisonment, or levying a fine of up to $500, or both.[56] Otherwise, tribal courts have criminal jurisdiction over offenses committed by Indians on reservations. Similarly, tribal courts have civil jurisdiction over cases with Indian litigants[57] and involving events or transactions that occurred on the reservation.

These general statements must be qualified, since some states have assumed civil and criminal jurisdiction over Indians on

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[53] 35 F. 575 (D. Ore. 1888).

[54] Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89, 96 (8th Cir. 1956).

[55] 18 U.S.C. §1153.

[56] 25 U.S.C. §1302(7).

[57] Tribal courts do not have jurisdiction over lawsuits brought by a non-Indian against a non-Indian, nor over criminal cases involving both a non-Indian victim and a non-Indian defendant. However a non-Indian can file a civil action in tribal court against an Indian, and a non-Indian can be sued by an Indian, assuming in the latter case the tribal council has adopted ordinances (such as a "long-arm statute" if the non-Indian defendant lives off the reservation) giving the tribal court jurisdiction over the subject matter of such cases.

reservations pursuant to P. L. 280. On those reservations affected by P. L. 280, state courts have jurisdiction.

The enforcement powers associated with a tribal court are limited to the geographic area within which the tribe carries out its governmental activities. The tribal police can arrest an offender or execute on a judgment on the reservation, but generally are without power to do so outside the reservation boundaries. In this respect tribal courts are similar to state courts, since a sheriff or policeman of one state cannot exercise his customary powers in another state. A court can have its orders enforced outside the geographic limits of its jurisdiction only if another court or another agency, having jurisdiction or authority to act, recognizes and enforces the first court's orders.

This legal and jurisdictional conflict can be important in a variety of contexts. Three examples of this are as follows:

--An Indian child is adjudicated delinquent, dependent, neglected, or in need of supervision by a tribal court, and parental custody is temporarily or permanently terminated. The court determines that this child would benefit from institutional care. There is no institution on the reservation capable of adequately serving the child's needs. A state institution, not located on an Indian reservation, has this capability. It is necessary for the state, through its courts and agencies, to recognize the tribal court order committing the child to this institution; otherwise, the child, through his natural parents, could secure his release from the state institution by a petition for habeas corpus.

--A tribal court orders temporary or permanent termination of parental rights over an Indian child and orders that the child be placed with foster parents. As long as the foster parents remain on the reservation, the tribal court retains supervisory power over this placement to determine whether it is in the best interest of the child to continue foster care and possibly to terminate the foster parents' custody in order to adopt the child into another family. However, if the foster parents move off the reservation, the tribal court can exercise its continuing jurisdiction over this case only through the state courts.

--An Indian child is adopted by a family pursuant to a tribal court order. However, the state agency in charge of vital statistics refuses to record the change of the child's surname to that of the adoptive parents. The validity of the adoption is thrown into question unless the tribal court order is recognized and enforced.

A different but related problem involves AFDC foster care assistance. One of the federal requirements for such payments is that the child be removed from the home of his or her natural parents or of a relative specified in the statute[58] "as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of the child . . . ."[59] This judicial determination could be made by a tribal court. The state agency administering the AFDC program or the county offices under its supervision must recognize this tribal court order, at least for this purpose, in order to approve payments.

A state court, faced with enforcing a tribal court order, must resolve several issues. First, it must determine whether the tribal court had jurisdiction over the persons and over the subject matter involved in that case. If the tribal court lacked such jurisdiction--for example, if both the plaintiff and the defendant were non-Indians--then its order would not be enforced. Second, it must determine whether it should recognize the order to be valid. And third, it must decide whether to issue its own order enforcing the tribal court's determination.

Traditionally, American courts have used two different legal concepts, full faith and credit and comity, for resolving these issues. The first principle is derived from Article IV, Section 1 of the United States Constitution, which provides that each state shall give full faith and credit "to the public acts, records, and judicial proceedings of every other state," and

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[58] See 42 U.S.C. §606(a)(1).

[59] 42 U.S.C. §608(a)(1).

authorizes Congress to legislate "the manner by which such acts, records and proceedings shall be proved, and the effect thereof." Comity is an aspect of "judge-made law" which is generally applied by the courts of one nation to the judicial decisions of another nation.

Despite these differences the actual effect of the application of these two doctrines is not markedly different.[60] This is in large part because there are similar policies underlying these doctrines: the full faith and credit clause was intended to make the several states "integral parts of a single nation" in which the rights of persons in one state will not be frustrated by inconsistent judicial decisions in other states,[61] while comity is based on principles of international duty and convenience and the rights of private parties. In both instances the rationale is that of respect for the decisions of the courts of other states or countries and protection of the rights of persons who have litigated in those courts.

In applying these general concepts to tribal court orders, several objections have been made to their recognition and enforcement. Four frequently raised objections are due process problems in tribal courts, failure of these courts to be "courts of record," the relationship between tribal politics and tribal courts, and the fact that many tribal judges are not lawyers.

(1) Due Process Objection. Tribal courts have in the past been criticized[62] for failing to follow principles of due process of law. Before 1968, tribal governments were limited by due process considerations only if the tribe's constitution or code contained a provision similar in language or effect to the due process clause in the Fifth and Fourteenth Amendments to the United States

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[60] See Restatement, Second, Conflict of Laws, §98, Comment b(1971).

[61] Milwaukee County v. M. E. White Co., 296 U. S. 268 (1935).

[62] See, e.g., Note, Tribal Injustice: The Red Lake Court of Indian Offenses, 48 No. Dak. L. Rev. 639, 648 (1972).

Constitution. That was changed by the 1968 Indian Civil Rights Act. Now 25 U.S.C. §1302(8) provides:

> No Indian tribe in exercising powers of self-government shall--
> . . .
> (8) deny to any person within its jurisdiction the equal protection of the laws or deprive any person of liberty or property without due process of law.

But this statute fails to state whether the due process requirements formulated in federal court decisions apply across the board to Indians, or whether there is a different "Indian due process" based at least in part on tribal traditions. This has not yet been resolved by the courts. Most courts that have spoken to this issue have stated that the usual due process guarantees may be modified where they conflict with tribal governmental or cultural interests.[63] However, the Ninth Circuit Court of Appeals has stated that due process under 25 U.S.C. §1302(8) has the same meaning as in the United States Constitution.[64]

The BIA position on whether tribal governments can follow different due process standards than federal or state courts is revealed by its proposed model code for the administration of justice by Courts of Indian Offenses on Indian reservations. While this proposed code covers only criminal procedure, not civil proceedings such as petitions to terminate parental rights, the discussion of the due process provision of the Indian Civil Rights Act would apply, at least by way of analogy, to the matters covered

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[63] Janis v. Wilson, 385 F.Supp. 1143 (D. So. Dak. 1974); McCurdy v. Steele, 353 F.Supp. 629 (D. Utah 1973); rev'd on other grounds 506 F.2d 653 (10th Cir. 1974); Lohnes v. Cloud, 366 F.Supp. 619 (D. No. Dak. 1973). See also Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231, 1237 n. 14 (4th Cir. 1974), which implied that the "formality and procedural requisites" of Anglo-American due process might not be required in an Indian context, as long as the proceedings are "addressed to the issues involved in a meaningful fashion and pursuant to adequate notice." And cf. Big Eagle V. Andera, 508 F.2d 1293 (8th Cir. 1975), in which the Court indicated that a statute that would otherwise be so vague as to violate due process requirements might be valid if the vagueness were cured by a limited interpretation by the tribal court which was well known to the Indian reservation community.

[64] Johnson v. Lower Elwha Tribal Community of Lower Elwha Indian Reservation, Washington, 484 F.2d 200 (9th Cir. 1973).

in this report. The Solicitor for the U. S. Department of the Interior states in the commentary to one of the sections of the proposed model code:

> Some persons have expressed fears that the act was intended to require tribal courts to adopt all of the standards and technical requirements which apply to the trial of criminal cases in non-Indian courts. They object that doing so will result in a breakdown of the tribal court system. Imposing American judicial precedents on tribal courts might indeed cause great problems, however, such a requirement apparently was neither intended nor expected by Congress when passing the Indian Bill of Rights. Respect for the broad principles of due process and equal protection of the law is required of tribal courts, but the specific interpretation of those principles found in the case law of American courts does not bind the tribal courts in precisely the same way or to the same degree. That interpretation may be made by tribal courts within the framework of basic fairness and sensitivity for more traditional Indian approaches for administering justice.[65]

The commentary also states:

> in the context of trial procedure, due process of law, in its barest essence, means that an accused person shall: (a) be advised of the charges against him; (b) be given notice of the time and place where his case will be heard; (c) have an opportunity to confront his accusers; (d) have the opportunity to present evidence in his own behalf; (e) and have the question of guilt or innocence decided by a trier of fact whose decision is based solely on the evidence presented in the case and not on any preconceived notions, regardless of whether trial is by the judge or by a jury.[66]

Some "broad guidelines" are offered as to the types of factual issues which the Solicitor suggests the prosecution must prove in order to convict a person and as to the types of defenses that can be raised by the accused. The commentary notes that "[b]eyond these broad guidelines, however, tribes should feel free to experiment with procedures which guarantee fundamental fairness to both parties but which also facilitate the prompt, efficient and economical dispensation of justice."

As a result of the Indian Civil Rights Act, then, a tribal government must use procedures that assure a fair hearing with

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[65] 40 F. R. 16689, 16698 (1975).

[66] 40 F. R. 16689, 16699 (1975).

adequate advance notice when taking any action that might deprive a person of liberty or property. Also, the substance of the action taken must not be arbitrary--it must be reasonably related to a legitimate governmental purpose.[67]

Under the general doctrines of comity and full faith and credit, a judgment in another jurisdiction is entitled to judicial recognition and enforcement if there has been a reasonable method of notification and a reasonable opportunity to be heard for the parties affected by that judgment.[68] There is no requirement that specific due process procedures have to be followed. Thus an Indian tribal court judgment or order which meets basic requirements of notice, impartiality, and opportunity to litigate the issues would meet the general due process requirements for recognition and enforcement in a state court. As a practical matter, however, a tribal court which follows procedures closely resembling those of state courts will more likely be granted effect off the reservation.

(2) Court of Record Objection. It has also been argued that many tribal courts are not "courts of record," and therefore not entitled to recognition and enforcement in state courts. While the precise meaning of the term "court of record" is not always clear, it has generally been interpreted as referring to a court which maintains a regular record of its proceedings. The real question is a matter of proof: whether or not the basic facts surrounding a court's orders and judgments can be proved in another court through these records. These records should include information as to the parties, the method by which the defendant was notified of the proceedings, the nature of the matter under dispute, and the court's decision. It does not require the keeping of a full

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[67]Dodge v. Nakai, 298 F.Supp. 26 (D. Ariz. 1968); Solomon v. LaRose, 335 F.Supp. 715 (D. Neb. 1971).

[68]Restatement, Second, Conflict of Laws §§92, 93, 98 (1971). According to §98 of the Second Restatement, the judgment of a foreign nation will be recognized only if it was the result of a "fair trial in a contested proceeding." Comment c to this section indicates that this means that the court rendering the judgment must be impartial, and the proceedings free from fraud.

transcript or recording of the actual proceedings, although the existence of such additional records would probably enhance that court's image in the eyes of the judges in other jurisdictions.

(3) Tribal Politics Objection. Another area in which tribal courts have been criticized is the frequent close links between tribal judges and volatile tribal politics. Many tribal councils and chairmen serve only one two-year term before being replaced by members of an opposing political camp. Tribal judges are also often caught up in this revolving-door politics. Also, some trial judges' orders will be slanted in favor of members of their clans. It is unknown what effect, if any, this has on tribal court orders for children who are wards of the court.

(4) Non-Lawyer Judges Objection. Most Indian tribal judges are not lawyers, a result of the relatively small numbers of Indian attorneys. Hopefully this will improve over time, just as the current tribal judges improve their skills through training programs.[69] This factor is not a bar to recognition and enforcement of tribal court orders as long as the court has jurisdiction, provides notice and an opportunity to be heard, and hears its cases impartially.

The question of the effect to be given Indian tribal court orders first arose in the United States Supreme Court case of United States, Use of Mackey v. Cox.[70] This case involved the death of Austin Raines, who had been acting under a power of attorney for three administrators appointed as such by the Cherokee Nation. Raines collected a sum of money owed by the United States to the deceased, and then lost his life and the money in a boiler explosion. The Cherokee administrators sued to collect on Raines' surety bond. The Supreme Court concluded that Raines' power of attorney and his actions in the District of Columbia were valid. The opinion noted that, by statute, an administrator appointed by

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[69] See 1 Justice and the American Indian, 49-50 (1974).

[70] 59 U. S. (18 How.) 100 (1855).

a state or territory of the United States has the authority to act on behalf of the estate in the District of Columbia, and stated that the Cherokee Nation "may be considered a territory of the United States" within the meaning of this statute.

The next major case involving this issue was Mehlin v. Ice.[71] This was a federal case seeking possession of property situated within the Cherokee Nation. The defendants argued that they had lawfully ousted the plaintiff from that property under a tribal court order. The federal court held that the tribal judgment barred it from ordering contrary relief. It quoted at length from the Mackey case, and stated:

> The proceedings and judgments of the Cherokee Nation in cases within their jurisdiction are on the same footing with proceedings and judgments of the territories of the Union, and are entitled to the same faith and credit.[72]

Within a month, the same court decided Exendine v. Pore,[73] with similar facts and the same result.

Two subsequent cases, also involving Oklahoma tribes, illustrate that procedural irregularities in the tribal courts do not preclude the recognition and enforcement of their orders in other courts. In Cornells v. Shannon,[74] the plaintiffs sought to enjoin enforcement of a tribal court judgment which had imposed a fine on them. The court used the same language and full-faith-and-credit reasoning as in Mehlin and Exendine. It stated "mere irregularities or errors" in tribal court proceedings would not prevent it from recognizing tribal court orders.

This position was extended in Barbee v. Shannon,[75] in which the plaintiffs sought to enjoin what they claimed was the defendant's continuing trespass on land leased from the Creek Nation. The plaintiffs claimed that their right to lease this land had been

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[71] 56 F. 12 (8th Cir. 1893).

[72] 56 F. 12 (Ibid.) at p. 19.

[73] 56 F. 777 (8th Cir. 1893).

[74] 63 F. 305 (8th Cir. 1894).

[75] 1 Indian Terr. 199, 40 S. W. 584 (1897).

decided in their favor and against the defendant by the tribal court. However, the tribal court order failed to state whether it was the result of a hearing or even what type of proceeding was involved, and the territorial court concluded that this order was not entitled to full faith and credit. The territorial court still enforced this order, though, since another tribal judge dismissed a suit filed by one of the parties to the earlier tribal court case on the ground that this earlier case had adjudicated the issue of the parties' rights to the property. This second tribal court judgment met the basic requirements for recognition.

These two cases illustrate that even informal proceedings can be recognized. The Barbee case further illustrates that tribal court records must meet certain minimal information requirements before courts in other jurisdiction will grant full faith and credit. These records must show at least that the court's order was the result of an adversary hearing, since a state court might otherwise consider it merely advisory and not entitled to any conclusive weight, as in Butler v. Wilson.[76]

In the last twenty-five years, only two cases, both involving the Navajo Nation, have raised the issues of full faith and credit or of comity as applied to tribal court judgments. The first of these, Begay v. Miller,[77] concerned a state divorce decree, ordering alimony and child support payments, and an earlier tribal divorce decree, which did not. The petitioner had been imprisoned for contempt of court for failing to pay the alimony and support ordered in state court. The Arizona Supreme Court held that the state court was without jurisdiction to hear a divorce matter that had already been decided in tribal court. The Court refused to classify the theory for its decision as full faith and credit,

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[76] 153 P. 823 (Okla. 1915).

[77] 70 Ariz. 380, 222 P.2d 624 (1950).

since the Constitution only refers to states, or as comity, which the Court claimed "presupposes two independent sovereign nations," and "the Navajo tribe is not now classified as such." Instead, it recognized the tribal court decree

> because of the general rule, call it by whatever name you will, that a divorce valid by the law where it is granted is recognized as valid everywhere.[78]

In a much more recent case, Jim v. CIT Financial Services Corp.[79] the New Mexico Supreme Court held that a Navajo statute be granted full faith and credit. This Court reasoned that a federal statute, 28 U.S.C. §1738, which implemented the full faith and credit clause, provided for recognition of the statutes of territories of the United States, and that the Navajo Nation is a "territory" within the meaning of that statute, citing the Mackey case.

Despite the objections mentioned above, there is a line of cases which have granted full faith and credit to tribal court orders. So far, however, these cases have been decided on a state-by-state basis. Mackey does not deal squarely with this issue, and the application of the other cases is limited to the federal Eighth Circuit (which included the states of North Dakota, South Dakota and Minnesota at the time of Mehlin and associated cases) for federal cases, and to New Mexico and Arizona for state cases. Each state must decide the issue in its courts--at least, until there are more definitive rulings in the federal courts.

One additional complication, not discussed in any of these cases, is the question of full faith and credit for modifiable tribal court orders. Certain court orders, including orders relating to the custody and supervision of a child, can be modified by the court that issued them. The position of the Restatement, Second, Conflict of Laws §109 (1971) is that a state "is free to

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[78] Ibid. at p. 628.

[79] 533 P.2d 751 (N. Mex. 1975).

recognize or enforce" a modifiable order rendered in another state, but need not do so. Thus even if a state generally granted full faith and credit to tribal court orders, its courts could refuse to enforce a modifiable tribal court order if in the state court's opinion there were sufficient grounds to modify the tribal court order. Returning to the second example given at the beginning of this section, if the tribal court places a child with foster parents who then move off the reservation, a state court could decide that it would be in the best interests of the child not to enforce a tribal court order for the child's return. This type of situation may have to be resolved through reciprocal agreements, compacts, or statutes among the states and tribes for enforcement of modifiable orders rendered by other jurisdictions.

The question of whether tribal court orders regarding foster care placements are sufficient for AFDC foster care assistance purposes has been resolved more clearly. A Program Instruction[80] of HEW-SRS requires states administering or supervising the administration of Title IV-A state plans to provide this assistance if the tribal court has ordered foster care and the other eligibility requirements have been met.

We have been advised that state attorney general opinions in Colorado and Utah conclude that tribal court orders are entitled to full faith and credit, but we cannot verify these statements as the opinions are not available. There have also been bills introduced in state legislatures, such as in South Dakota, which would resolve the issue by adopting the rules of the Uniform Reciprocal Enforcement of Judgments Act as between the state and specific tribes.

Other unsettled areas remain, even if the principle of states granting full faith and credit to tribal court orders were generally adopted. For example, many perceive the tribal courts

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[80]ASA-PI-75-13, CSA-PI-75-2.

to be lacking in rudimentary due process, and this is a substantial barrier to acceptance of their orders. Further, those Indians who strongly advocate tribal sovereignty may be somewhat uncomfortable with the reciprocal effect--that tribal courts must give full faith and credit to state court orders on the reservation.[81]

Activities of State or County Social Workers on Indian Reservations

A third area of jurisdiction conflict is the role of state and county social workers who are providing services to Indians on Indian reservations. Although this issue does not appear to have surfaced in HEW conformity proceedings or in court cases, some state and county social workers are reluctant to act in the fact of legal or jurisdictional uncertainties.

Obviously, the activities of social workers are central to the delivery of services in foster care and adoption programs. The nature of their activities is explored in more detail below. Day care, while more of an educational service, also involves social workers to a significant extent.

What a given social worker will do in a particular case is largely a function of the needs of the person he or she is serving. Since these needs differ greatly, it is difficult to summarize all of these various activities in a simple formula. The following is a partial list of the settings in which a social worker can become involved.

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[81] It has been suggested that reciprocity is a necessary condition for the recognition and enforcement of tribal court orders by state courts. "Reciprocity" means that state and tribal courts would recognize and enforce each other's orders; it would mean that a state court judgment to recover a debt against an Indian debtor (assuming that the state court had jurisdiction) would have to be enforced by the tribal court. There is a U. S. Supreme Court case, Hilton v. Guyot, 159 U. S. 113 (1895), in which, by a 5-4 vote, it was held that a federal court could re-examine the determination of a court of a foreign nation (that is, not recognize and enforce that court's judgment) if that foreign nation's court would do the same for a U. S. judgment. However, the Hilton case has been rejected by several states and may not even be binding now on federal courts. See Restatement, Second, Conflict of Laws §98 Comment e (1971).

Even before foster care proceedings are begun, a state or county social worker may have been providing protective services, counseling for the child and the natural parents, and referral to institutions which can provide out-of-home care. All of these would require that a social worker enter onto the reservation in order to meet with the family. If institutional care is provided, it would be necessary to obtain either parental consent or a court order for such placement. This would be governed by the applicable law and the appropriate court, which in a non-P.L. 280 state would be a tribal court.

Should matters reach the stage of separating the child from his or her natural parents, social workers may be involved in any of the stages of the proceeding. There are two basic methods for terminating parental rights: voluntary relinquishment by the parents and involuntary termination by a court (which is often on a temporary basis, as by making the child a ward of the court). In the context of court proceedings, a state or county social worker might submit or assist in the submission of a petition for termination of parental rights. Frequently, the court, whether it is within the state or tribal court system, will require that a study of the home of the child's natural parents be performed in order to determine whether the child is dependent or neglected. The social worker who performs this study (who may be an employee of the court's probationary department instead of the state or county welfare department) will report directly to the court. If the court finds that the natural parents' rights as to this child should be terminated, it might then decide to award temporary custody of the child to the state or county welfare department with instructions that its social workers arrange for foster care. Alternatively, the court might place the child in its own custody and grant rights of supervision to the welfare department. The difference between these two procedures is a difference as to who shall have the ultimate power to determine what type of placement is in the best interests of that child. In either case, a state or county social worker would then find a suitable pair of foster parents who met state standards.

If voluntary relinquishment were the means used, judicial approval may still be required to ensure that parental consent is truly voluntary. The law determining the necessary procedures in

a relinquishment context is that of the place of the natural parents' domicile. If the natural parents are domiciled on a reservation in a non-P.L. 280 state, tribal law controls. Even if the court is involved, a social worker would not be required to report to the court concerning a home study. Once relinquishment has been validly accomplished, the procedures for custody, supervision, and foster care placement are the same as for involuntary termination.

Placement in a foster home does not end the role of the social worker. Further follow-up studies should be performed, supplemental reports to the court may be required, and attempts to return the child to the natural parents might be explored.

The initial procedures in adoption cases are generally the same as in foster care proceedings, although in some cases foster care might not be an intermediate stage between the home of the natural parents and that of the adoptive parents. Essentially, either the natural parents must voluntarily relinquish the child or a court must terminate their rights wihout their consent. Once this has been done, either the state welfare department, a private placement agency, or (if one exists) a tribal placement agency can screen persons applying to be the adoptive parents for that child. This often involves a home study of the applicants to determine which would be best parents according to the guidelines of the department or agency. Once an applicant has been selected, a petition to the appropriate court is generally required, with a hearing to formally ascertain the desirability of this proposed placement. The social worker who performed the home study may be required to report to the court, and in addition a judicial probation department social worker might prepare and report on its home study.

As with licensing, the critical jurisdictional issue with regard to the activities of state and county social workers is whether the specific functions they perform in Indian country are an exercise of state jurisdiction which interferes with tribal self-government. But before reaching that issue, it should be noted that, as with state inspections discussed earlier, tribal governments have the power to exclude non-members from the reservation. Their

power to do so is limited by the due process requirement of the Indian Civil Rights Act, so that the decision to exclude a person must be based on a reason that is rationally related to a legitimate governmental interest. It is not clear whether this would require individual decisions for each social worker where there has been a departmental policy or a pattern of behavior of, for example, placing Indian children with non-Indian adoptive parents where the tribal government considers such behavior to be contrary to its fundamental interests.

Assuming that the tribe does not attempt to exercise the power to exclude, it appears that almost all the activities of state and county social workers on an Indian reservation may not constitute an exercise of jurisdiction. This is for two reasons: first, most of these activities do not involve the use of governmental enforcement powers, and second, it is federal and tribal governments which apply enforcement sanctions, with the possible exception of the award of custody of a child to a state or county agency. As explained in the analogous area of licensing, the voluntary acceptance of state or county provided services by an on-reservation Indian recipient does not raise jurisdictional issues. Most of a social workers' activities are cooperative in nature. Even where a person refuses to allow a social worker access to his or her home--as may occur for a home study of the natural parents for a petition to involuntarily terminate their parental rights--the state or county welfare department can apply to the tribal court for an order requiring such access, in which case tribal, not state, authority would govern.[82]

Jurisdictional conflict could arise if a state or county welfare department were to be granted custody of an Indian child by a tribal court. The state or county would then have the power to make fundamental decisions about the case, treatment and future of that child, including the decision to place the child in an off-reservation foster care or adoptive home. This would mean a change in the government having "jurisdiction" (using this term broadly)

[82] There may be a problem if the child is found neglected or abandoned off the reservation, thus giving the state courts jurisdiction (e.g., In re Cantrell, 495 P.2d 179 (Mont. 1972)), but the child's natural parents live on the reservation. In this situation, the state court would not have jurisdiction over the parents, and the tribal court might refuse to enforce a state court order requiring these parents to permit a state or county social worker to inspect their home.

over that person from the tribe to the state or county. In the case of Black Wolf v. Juvenile Court,[83] a practice in which the tribal court transferred jurisdiction over an on-reservation Indian child to a state court in order to facilitate placement in an off-reservation institution was held to be an assumption by the state of jurisdiction over Indians in Indian country without following the formalities of P.L. 280, as amended. A similar challenge could be made of a transfer of custody to a state or county agency. This possibility could be avoided by the tribal court's retention of jurisdiction over that case. The tribal court can order the child placed in the supervision of the state or county welfare agency with custody remaining in the court, or it could grant temporary custody to the state or county on the condition that the child not be removed from the reservation.[84] This way the tribal government's powers would not be diminished.

When dealing with the tribal court, then, the state or county is recognizing tribal sovereignty over the tribe's own members. This should cause no problem for most of a social worker's activities, especially those in which no court and no governmental enforcement power is involved.

In P.L. 280 states, the state would have jurisdiction over Indians on reservations. This means that the state court would have jurisdiction over relinquishment and termination of parental rights cases, and custody could be given to the state or county agency without jurisdictional difficulties. The distinction between state authority over the person of an Indian and state authority which interferes with the use of trust property does not apply here.

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[83] 493 P.2d 1293 (Mont. 1972).

[84] Even if the court retains custody, if the child is taken off the reservation, the tribal court would lack the direct authority to order his or her return. However, it could use its powers of civil or criminal contempt to punish a person who acted in defiance of its orders, with the possible effect of deterring future violations.

There is statutory authority for the state agency to purchase services--the services of social workers--from the tribe or from the BIA. This authority, and the implementing regulations, are discussed more fully in Section III. The major limitation on this practice are the regulations in 45 C.F.R. § 226.1(a)(2), which require the state or local agency to:

> retain continuing, basic responsibility for determination as to:
>
> (i) The eligibility of individuals for services; and
>
> (ii) The authorization, selection, quality effectiveness, and execution of a plan or program of services suited to the needs of an individual or of a group of individuals.

This may require at least pro forma authority to override the decisions of BIA or tribal social workers. If interpreted stringently, it may prohibit effective use of social workers who are not employed by the state.

Alternatively, 25 U.S.C. § 452 (also discussed in Section III) would permit the BIA to contract for the services of state or county social workers, and 25 U.S.C. §§ 47 and 450 et seq. authorize the tribes to perform these functions under BIA contract.

State Case Studies

The foregoing analysis of the conflicts in tribal and state jurisdiction and authority over reservation matters demonstrates that the legal position taken by state governments vitally affects the delivery of child welfare services to reservation Indians. Any modification of or alternative to the current delivery system must therefore take into account the role of the states. We believe a study of the legal and jurisdictional issues which have arisen in two states, Arizona and North Dakota, will be useful. These states were selected for detailed examination because in both states the recurring conflicts have been sharply defined and squarely faced, and formal attempts at resolution of the issues have been recorded in advisory opinions and litigation.

Arizona has in its constitution a provision disclaiming any state interest in or title to Indian lands within its boundaries,[85] of the sort commonly required as a condition of statehood by the federal government. It did not choose to assert substantial civil or criminal jurisdiction under P. L. 280, and has extended only its air and water pollution laws to reservation lands. Arizona is also the principle situs of the Navajo nation, by far the largest and among the financially most powerful of the Indian tribes in America.

State welfare administration in Arizona is located within an umbrella agency, the Department of Economic Security (DES).[86] DES is designated as the single state agency, is responsible for preparing the annual state comprehensive plan, and in all respects is the state agency relevant to our considerations.

Arizona and the tribes and individual Indians within it, principally the Navajo, have produced a great amount of the litigation defining the respective limits of state and tribal authority. We discussed in Section I of this report the recent landmark cases dealing with state authority to tax Indians, McClanahan and Warren Trading Post. The current test for determining the limits of general exercise of state powers vis-a-vis tribes came from Williams v. Lee. All these cases involve the State of Arizona and the Navajo nation.

The case universally regarded as establishing the proposition that reservation Indians are entitled to Federal Social Security Act benefits is Arizona v. Hobby.[87] Again, we must immediately caution that the trial court upheld the Social Security Administrator's decision not to approve Arizona's state plan which prohibited paying assistance to persons of Indian blood living on reservation. On appeal, the District of Columbia Circuit Court held that the trial court never should have even answered the question, as federal sovereign immunity barred the state from bringing the suit. Technically, the case is therefore extremely weak precedent for the proposition it is universally cited as upholding.

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[85] Ariz. Const. Art. 20, ¶4.

[86] A.R.S. §§ 41-1951 to 1962.

[87] 221 F. 2d 498 (D.C.Cir. 1954).

The importance of state regulations in the delivery of services is highlighted by Arizona State Department of Welfare v. HEW.[88] This was a petition by the State of Arizona for review of a final decision of the Secretary of HEW that public assistance plans in Arizona failed to conform to requirements.

The part of this suit of most interest to us involves Arizona's legal custody requirement for AFDC.[89] Arizona State Department of Welfare, Assistance Payments Manual § 3-401.3, stated:

> A relative of a natural parent who is an ADC recipient cannot be approved for an ADC grant on behalf of any of the children of said parent unless said relative or the (Arizona) Department of Public Welfare has legal custody of the child or children named in the application.

Dismissing the necessity of invoking equal protection arguments, the court emphasized the failure of such language to be in conformity with the AFDC program set out in federal law. Thus, citing 42 U.S.C. § 601, it underlined the portions below:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such state, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence . . . .

And in 42 U.S.C. § 606:

> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepsister, uncle, aunt, first cousin, nephew or niece in a place of residence maintained by one or more of such relatives as his or their own home. . .

Then expanding upon this point, the court said:

> A household consisting of the child and his "grandfather, grandmother" etc., is as such a "family" within the meaning of the Act as is a household consisting of the child and his mother or father. . . This point is particularly critical in this case, since, as the

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[88] 449 F. 2d 456 (9th Cir. 1971).

[89] In another part, Arizona's plans for CWS and AFDC pursuant to Title IV, 42 U.S.C. §§ 601-610, 620-626, was held not in conformity for failure to set up advisory committees at state and local levels required by 42 C.F.R. § 220(A), § 220.1, and § 220.4(a). Arizona argued that those advisory committees were inconsistent with 42 U.S.C. § 602(a)(3) in that they would be de facto a second agency and only a "single state agency" could administer the state plan. This contention was overruled.

> evidence showed and as the Administrator pointed out "a common, if not the predominant cultural pattern among Mexican-Americans and Indians in Arizona is the extended family." Under this cultural system, it is common for children to live for short periods with relatives. In order to receive AFDC, however, these relatives would have to undertake the burdensome and costly task of acquiring legal custody, which may invest the situation with a degree of permanence that is unacceptable to everyone concerned." Thus, Arizona's legal custody requirement falls especially heavily on Arizona's Mexican-American and Indian minorities.

This Ninth Circuit recognition of the nature and viability of the "extended family" as a child rearing institution represents a significant precedent both legally and administratively.

The Arizona Attorney General has also issued rulings which significantly affect the delivery of state-administered services to reservation Indians, and we find these opinions raising issues which recur in other states. The point again emphasizes the importance of state law, as interpreted by State Attorney General, in the delivery system.

For example, Arizona will not license activities of welfare institutions or agencies located on Indian reservations.[90] Nor will it license the Tribal Council or Bureau of Indian Affairs in the event "they engage in child placing and adoptive activities." The opinion is based on an interpretation of Section 8-501, Arizona Revised Statutes, defining child welfare agencies:

> "Child welfare agency" or "agency" means any agency or institution maintained by a municipality, county, person, firm, corporation, association or organization to receive dependent, neglected, delinquent or mentally or physically handicapped children for care and maintenance or for placement in a family home or any institution that provides care for unmarried mothers and their children.

Arizona Revised Statutes, Sections 8-506 to 8-508, make it mandatory that all child welfare agencies be licensed by the State Department of Public Welfare. Sec. 8-508(B) provides that the superior court shall have jurisdiction to issue an injunction restraining the operation of a child welfare agency without a license. Other sections permit investigation of institutions, as well as foster homes, and parental homes in adoption proceedings.

The Attorney General's Opinion, using Williams v. Lee as a standard, determined that the state could not license welfare institutions or agencies, or child placing or adoptive activities, on the Indian reservation.

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[90]Att'y. Gen. Op., Feb. 11, 1959, No. 59-38.

Another important Attorney General's Opinion is recorded in a letter of July 28, 1970, to John Graham, Commissioner, Arizona State Department of Welfare. This opinion is significant in that it addresses itself to the 1968 Civil Rights Act. It says:

> Title IV, § 402(a) of the 1968 Civil Rights Act, P. L. 90-284, 25 U.S.C. §1322(a) gives jurisdiction to state courts over civil causes of action which arise in Indian country situated in such state, with the consent of the tribe. §404 of the same Act, 25 U.S.C. §1324 gives consent to the states to amend their State Constitution or existing statutes to remove any legal impediment to the assumption of any criminal or civil jurisdiction.
>
> The Federal and State laws have been searched and nothing has been found which would indicate that either Congress or the State of Arizona has done the necessary acts which would provide for civil jurisdiction over the Indian tribes. The 1968 Civil Rights Act is permissive. It does not require the tribe to submit to the state's jurisdiction. Jurisdiction is conditioned on the consent of the state to assume jurisdiction and the consent of the tribe to submit to jurisdiction. 25 U.S.C. §§ 1324 and 1326.
>
> The state legislature has not enacted the necessary laws giving the State Welfare Department jurisdiction to license facilities on the reservation. No tribe has indicated they would give the necessary consent to jurisdiction if such laws were enacted.

Further on, the opinion concludes:

> Absent the necessary legislation or constitution amendment, no change can be allowed by administrative policy or decision. Therefore, the State Department of Public Welfare has no authority to license or approve facilities on the reservation pertaining to the care of Indian children hereinbefore mentioned.

In addition, the Attorney General's Opinion of July 28, 1970, deals with the authority of the Department of Public Welfare to include in the ADC-FH program reservation children who are placed in foster homes off the reservation.

> Under existing law regarding jurisdiction, ADC-FH payment can only be authorized for reservation Indian children if (1) the reservation Indian child is in fact off the reservation when the act of neglect or abuse occurs, (2) the Superior Court of Arizona has personal jurisdiction and makes an adjudication to that effect, (3) the child is committed to the Department of Public Welfare for placement and services, and (4) the requirements of §408 of the Social Security Act are complied with.

Lastly, the opinion considers the question of tribal courts as courts of competent jurisdiction and the effect to be given their orders by state agencies. The opinion states:

> . . . the tribal courts would have the authority to adjudicate a reservation child "dependent, neglected, or delinquent." . . . However, the jurisdiction of trival courts cannot extend byeond the boundaries of

> the reservation, therefore, tribal courts cannot place children in licensed facilities off the reservation.

It goes on to state further:

> Tribal courts have no executive arm to commit an Indian child to the Department of Public Welfare. Likewise, the Department of Public Welfare has no statutory authority to accept reservation Indian children from the tribal court or from any other sovereign.
>
> In order for the State of Arizona to provide services in the area of child welfare for families and children of reservation Indians, the state legislature or the people must enact laws to provide for jurisdiction over child welfare matters on Indian reservations. Also, the various tribes must accept the state assumption of jurisdiction. Otherwise, the exercise of state jurisdiction in child welfare matters discussed herein would undermine the authority of the tribes over reservation affairs and infringe on the right of the Indians to govern themselves. Williams v. Lee, supra. See also Arizona v. Turtle, 413 F. 2d 683 (1969), U. S. cert. denied. Littell v. Nakai, 344 F. 2d 486 (1965).

In practice there seems to be a way of getting around this, for DES has a contract with the BIA under which DES places Indian children in foster homes off reservations, thus using the BIA's authority to contract with states as a means for providing necessary services.

The final Arizona state actions which underline the significance of state authority and its effects on the delivery of services in the federal-state structure are those taken with respect to the Navajo Social Services Project. Full treatment of this matter is found in Section V of this report. For our present purposes, it suffices to note that the Arizona Attorney General's Opinion concluding that tribal contributions to the state agency could not be earmarked for a particular subsequent use was a hurdle which effectively stopped development of the project until removed by litigation. State court decisions, state laws, and state advisory opinions do critically impact the present delivery system.

We now turn to an examination of the delivery system in North Dakota, and the impact of various state actions there on the delivery of services to reservation Indians. For background, it should be understood that North Dakota had a provision in its constitution disclaiming any state rights to lands owned and held by Indians or Indian tribes.

The state supreme court had, before the passage of P. L. 280, interpreted this disclaimer rather strictly as applying to claims involving land title only, thus giving state courts jurisdiction over civil disputes between Indians on reservation lands.[91]

North Dakota took the steps necessary to extend its civil jurisdiction over Indian Country in 1963, but added the requirement of tribal - or individual Indian - consent.

An extremely important case in defining the limits of state authority is In re Whiteshield, decided by the North Dakota Supreme Court in 1963.[92] State authorities brought a petition to terminate parental rights to Indian children against Indian parents for acts occurring on the reservation. The court held that, since the Indians involved had not consented to the assumption of state jurisdiction, the state courts could not adjudicate the issue.

The North Dakota Attorney General's office has also been active in defining state authority, facing the questions of state authority in Indian country in terms of licensing foster homes and providing protective services on Indian reservations, and the effect to be given to tribal court orders by state agencies. The federal response to state officer's decisions on these matters has been carefully considered and well documented, and provides much food for thought in evaluating alternatives to the present structure.

In late 1970 the Public Welfare Board requested the State Attorney General's opinion on its authority to provide protective services on Indian reservations, brought into focus when the foster care program on Fort Totten was challenged. The Attorney General concluded that the Public Welfare Board could not enforce licensing functions regarding foster care homes for Indian children on Indian reservations.[93]

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[91] Vermillon v. Spotted Elk, 85 N.W. 2d 434 (No. Dak. 1957).

[92] 124 N.W. 2d 694 (No. Dak. 1965).

[93] Att'y. Gen. Op., Jan. 13, 1971.

The State Attorney General further concluded that the North Dakota Social Services Board could not contract with another agency to license foster homes for Indian children on Indian reservations.[94]

Lastly, the State Attorney General ruled that the State Youth Authority could not enforce rules of conduct for an Indian child if it placed him on an Indian reservation, could not change placement from the reservation, and could not bring the child back from the reservation.[95]

The federal response to these opinions and their effects, regarded by many Indians as a discriminatory withdrawal of state services from reservation Indians,[96] has been to seek a practical way for the state to find paths around the jurisdictional barriers. It has suggested that BIA and tribal officials can supervise the placement of Indian children in foster homes. It also has derived a method of certification of approval of day care facilities after inspection of them by tribal government or BIA agencies.

The conclusions and legal reasoning used by HEW attorneys reviewing this tangled situation is highly relevant and most significant. A lengthy memorandum was prepared by the HEW General Counsel's office[97] and can be summarized as follows:

A] The Equal Protection Issue

The memo outlines a strong stand, using Arizona v. Hobby, 221 F. 2d 498 (D.C.Cir. 1954) and Acosta v. San Diego County, 126 Cal. App. 2d 455, 272 P. 2d 92 (1954) stating that states must as a condition of receiving Title IV monies service Indians and find a way to approve foster homes on reservations; otherwise they are in violation of the Fourteenth Amendment's equal protection clause. (pp. 2-4)

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[94]Att'y. Gen. Op., July 28, 1971.

[95]Att'y. Gen. Op., Dec. 16, 1971.

[96]See letter, February 8, 1971, of Marvin Sonosky, General Counsel of the Standing Rock Sioux Tribe, to the tribal council.

[97]"State Obligations under the SSA in Regard to Indians Living on Reservations," by the Special Assistant to the Assistant General Counsel, addressed to Deputy Assistant Secretary for Legislative Welfare, August 9, 1974.

B] Foster Home Inspection

The memo deals with the possibility of an Indian foster care home on a reservation to which permission to inspect is denied, citing Wyman v. James, 400 U. S. 309 (1971), where the State of New York was upheld in refusing to grant assistance when a home visit was refused by an AFDC mother. The memo concludes:

> In other words, a state may, and must, extend its asistance to Indians living on a reservation in the state on the same conditions that it applies to all other recipients in the state: namely, that the recipient abide by the laws and regulations of the state governing assistance under its various programs. If an Indian living on a reservation should refuse to comply with any of those regulations or laws, the state could merely terminate assistance. (p. 4)

C] State Standards Must Be Different for Different Cultures

The most interesting theoretical discussion in the memorandum is addressed to the failure to put Indian children into foster or adoptive homes that are Indian. After citing AAIA statistics and testimony before the Subcommittee on Indian Affairs of the Senate Interior and Insular Affairs Committee on April 8, 1974, the problem is stated as follows:

> The standards which have been set are based on material criteria (sufficient living space, proper sanitation facilities, etc.) and do not take into account whether the child is harmed or not for lack of them. Also not considered are such non-natural criteria as the values of living in a cultural community with family and relatives. The standards, it is alleged, are not only of questioned fairness, but their results have led to the breakup of countless families, and according to several hearing witnesses, have caused the creation and continuation of psychological problems for both the Indian parents and their children.
>
> The issue has been raised, in regard to child welfare programs relating to Indian children living on reservations, whether a state may set a different standard for approving reservation Indian homes for foster care and adoption than it uses for other groups. In determining this, two questions must be answered: will a different standard be consistent with the Social Security Act and will it also be in harmony with the Equal Protection Clause of the 14th Amendment. . . ? (p. 5-6)

(1) The Social Security Act and Different Standards

The memo examines Sec. 402 of the Social Security Act which requires that AFDC must be provided on a state-wide basis and 45 C.F.R. 205.120(a), which requires that a state plan:

> . . . shall be in operation, through a system of local offices, on a state-wide basis in accordance with equitable standards for assistance and administration that are mandatory throughout the state. . . .

The memo interprets this regulation as follows:

> This should not be construed to mean that standards for reservation Indians may not be different from those non-reservation recipients across the state. If a standard produces substantially different results in one political subdivision of the state as contrasted with another, the standard is not uniform in terms of the results produced. Because the statute is directed toward a specific goal, solidarity of the family unit, it is the achievement of this goal that must be uniform and not the technical structure of the program. (p. 6)

(2) The Equal Protection Clause

Since there is, theoretically, a constitutional problem involved with implementing different cultural standards to achieve similar goals, the memo next deals with constitutional tests under the Equal Protection Clause. First, the "strict scrutiny test" does not apply to classifications in social and economic areas; second, the "rational relation test" does. The memo cites Dandridge v. Williams, 397 U. S. 471 (1969), rehearing denied 398 U. S. 914 (1970); Lindsay v. Natural Carbonic Gas Company, 220 U. S. 61; and Arizona Department of Public Welfare v. DHEW, 449 F. 2d 456 (9th Cir. 1971).

The conclusion is:

> In the case at hand, the classification upon which the standard would be based is Indians on reservations. The basis for the difference is clear: Indian culture and life style on reservations differ from that off reservations and require different treatment in order to fulfill (sic) the purpose of AFDC, which is to encourage family solidarity rather than to destroy it.
>
> The reservation Indians occupy a unique position in the United States, being the only judicially recognized minority group with a semi-nationality all their own.

Further discussion of the program instruction essentially implementing the thrust of this memorandum, and an analysis of potential problems, is found in Section V of this report.

V. NEW APPROACHES

Several new approaches to the delivery of services generally to Indian tribes have recently taken place. These approaches include:

> Program Instruction on AFDC Foster Care and Day Care Services for Indian Children Under Title IV-A and B on December 30, 1974 (ASA-PI-75-13, CSA-PI-75-2)
>
> Title XX, amending the Social Security Act, (Pub. L. 93-647), effective on October 1, 1975.
>
> Approval of the Navajo Social Security Demonstration Project, Arizona and New Mexico contracts, which would permit, under Sec. 1115, direct grants to the Navajo nation.
>
> The passage of S. 1017, the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638) on January 4, 1975.

None of these approaches directs itself entirely to a solution of the various legal problems already discussed. Some of them do represent a trend toward direct funding of Indian tribes. Some of them highlight particular legal problems which have been discussed. All of them have implications which cannot yet be fully assessed because they are so new; and all of them raise many legal and political questions in the process of answering other questions.

A description of each new approach follows, with accompanying comments about the implications of the approach.

Program Instruction "AFDC Foster Care and Day Care Services for Indian Children Under Title IV-A and B of the Social Security Act," Dec. 30, 1974.

As a result of a request from Region VIII,[1] The Assistance Payments Administration and Community Services Administration of HEW

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[1]The particular question posed was: "May we accept State Plan material which indicates certification of acceptability of child care facilities by some third party as sufficient to justify State expenditures and claims for FFP?" Policy Interpretation Request from Acting Regional Commissioner, SRS, Francis T. Ishida, to James Delaney, Director of the Executive Secretary, SRS, March 28, 1974.

issued a joint program instruction[2] on December 30, 1974 directed toward AFDC Foster Care and Day Care under Title IV-A and B for Indian children. The instruction dealt with the legal and jurisdiction issues which have raised problems in the delivery of these services to Indian reservations, and thus attempted to be a definitive response to these problems under the presently existing system. To summarize it:

1. Foster Care

The instruction made it clear that a state must make strong efforts to overcome obstacles to the delivery of AFDC assistance to Indians who as "citizens of the State in which they reside . . . are . . . entitled to all rights, privileges and immunities that are accorded other citizens."[3] It could not be "relieved of responsibility to supply AFDC foster care by asserting statutory or administrative authority, or lack of such authority, which prevents an otherwise eligible child from meeting all the conditions under section 408."[4] In short, "it must take whatever action is necessary to remove obstacles to a child's eligibility."[5]

These actions included:

a. Tribal Court Jurisdiction

> Where an Indian Tribal Court has jurisdiction over civil actions on an Indian reservation, it must be recognized as competent to make such a judicial determination.

b. Tribal Court Recognition

> . . . a state agency must accept responsibility for care and services for an otherwise eligible child from an Indian Tribal Court, or enter into an agreement with the public agency which has

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[2]APA-PI-75-13, CSA-PI-75-2.

[3]Ibid., p. 2.

[4]Ibid., p. 2.

[5]Ibid., p. 2.

accepted responsibility for the child. Refusal by the state agency to do one or the other could arbitrarily exclude from AFDC foster care and services all otherwise eligible children who are within the jurisdiction of an Indian Tribal court. Thus, if action by the state agency is necessary to make the child eligible, the agency must take that action.[6]

c. Licensing

The State must license or approve for AFDC foster care foster family homes and nonprofit, private, child care institutions on Indian reservations, which meet the state's licensing standards.

Even where the state believes it is without the power to enter a reservation for inspection purposes, it is responsible for obtaining the requisite authority, or for arranging with someone who has the authority, for inspections and reports to be made in order to carry out its responsibilities.

2. Day Care

Here, the instruction, after affirming that "Section 402 requires that the state provide assistance in the form of day care statewide for all eligible children, including Indian children," expanded upon possible contractual solutions to the licensing problem:

For instance, the state could contract with the Tribal Council, or some other agency or organization with the requisite authority to carry out these responsibilities on behalf of the state agency. Whatever method is used, the state must carry responsibility for meeting the pertinent requirements of the law and regulations.

3. Licensing Standards

The memorandum then reviewed state licensing standards as

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[6]Tribal Court jurisdiction and recognition as discussed here is a reiteration of State Letter No. 1080, March 25, 1970, which reads in part:

3. The Social Security Act provides that Federal sharing is available, under certain conditions when a child has been removed from his own home as the result of a judicial determination. The court or other judicial authority must have jurisdiction in such matters. Indian tribal courts and Courts of Indian Offenses are courts of competent jurisdiction in this respect and are so recognized by the laws and regulations of the United States. Therefore, on Indian reservations, the authority of the tribal court to make such judicial determinations must be recognized by the state welfare agency as a proper authority for this provision of the Act.

applicable to Indians, finding them inappropriate:

> Present standards, as applied to Indians on reservations in foster care and day care areas, have resulted in an extremely high rate of removing Indian children from their homes and families, compared to the rate for non-Indian children. A major reason for these statistics has been that the standards employed in determining the fitness of homes for children are not attuned to Indian society. These standards are based upon material considerations without sufficient emphasis upon non-material criteria, such as the value of living in a cultural community with family and relatives.

The solution to this problem devised and required by the instruction was to determine the equitability of standards on the basis of their effect upon recipients rather than their similar statutory language. Thus:

> Section 402 implemented at 45 C.F.R. 205.120(a) . . . does not require that the standards for Indians living on reservations be the same as for non-reservation recipients. If one standard produces substantially different results in one political subdivision of the state as contrasted with another, the standard is not uniform in terms of results produced. <u>If different standards would be more likely to accomplish the goals of the Act, they are permissible in order to remove the hardship, and in extreme cases may be required</u>. (emphasis supplied)

The program instruction represents the strongest and most comprehensive recent statement of HEW in Washington concerning the legal and jurisdictional problems encountered in the delivery of child welfare services and assistance to Indian reservations, under Titles IV-A and IV-B. If we leave aside for the moment the problems posed by the third part of the program instruction, the discussion of "equitable standards," we can examine the instruction in practical perspective to determine how much of an effect it has upon the child welfare delivery system as it presently operates.

The program instruction is not a response by Washington HEW to a new situation. On the contrary, the problems described have been in existence for years and have erupted in two states, Arizona and North Dakota to the point of head-on confrontations

between the states, on the one hand, and the tribes and HEW on the other. It represents a compilation of previous HEW determinations concerning service to Indian reservations in one place: State Letter 1080 on recognition of Tribal Court orders, Regional Attorney's opinions on "public agency," and the numerous admonitions from HEW which appeared in 1971 and 1972 at the height of North Dakota's refusal to bring child welfare assistance and services to the Indian reservations.

It uses unusually forceful language, ordering the states-- as a condition of receiving Titles IV-A and B funds-- to overcome existing legal barriers, if necessary by reaching agreements with other agencies including tribes.

One of the difficulties with a program instruction is that it does not carry the force of a statutory provision or regulation. A program instruction is not published in the Federal Register or codified in the Code of Federal Regulations. It is defined by the Department of Health, Education and Welfare as:

> Requirement or request for action by or information from state agencies, or other grantees, . . . issued by the cognizant SRS component and identified by issuing office, fiscal year, and sequence of issuance.[7]

In the hierarchy of program material issuing from SRS, program instructions fall after program regulations (program requirements and other policy material usually published in the Federal Register and codified in the Code of Federal Regulations) and program regulations guides (explanatory and interpretive material relating to one or more regulations). Thus, a program instruction is not readily available to the public nor does it carry as much weight as other types of regulations, a problem which will become particularly apparent in dealing with the "equitable standards" portion of the instruction. It is, however, the official HEW interpretation and thereby entitled to great weight by reviewing courts.

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[7] Information Memorandum AO-IM-25, DHEW, October 1, 1970.

In addition, there are several limitations in the program instruction. To begin with, it attempts to make mandatory upon the states the making of agreements, when necessary, to overcome obstacles in licensing foster care and day care facilities on Indian reservations. However, no statute or regulation provides for a mandatory procedural mechanism to be followed in the making of such agreements, a mechanism which would arbitrate differences if and when they arise. For example, as it presently stands, the only conceivable instance in which refusal to reach an agreement might represent sufficient cause to invoke mandamus action against a state welfare agency would be when the agency denied a tribal request to discuss the making of such an agreement. Where no procedural mechanism exists to facilitate an order,the order is greatly vitiated.

Second, the program instruction requires a state agency to accept responsibility for a child referred by a tribal court. The matter may not be that simple: state supreme court cases, such as Black Wolf and Kennerly, have determined that state agencies do not have the jurisdiction to accept such referrals. Further, the fall-back alternative--to require the making of agreements to get around the jurisdictional obstacle--while a practical suggestion suffers in the present system from the same unenforceability already discussed in reference to licensing agreements.

The inclusion in the program instruction of an order to use standards for choosing day care and foster care facilities for Indian children which are designed to achieve similar results to those used for other children; but are not necessarily the same standards, presents some thorny legal problems. This part of the instruction perhaps reflects the growing pressure from the Indian community to prevent Indian children from being put into non-Indian foster homes and adoptive homes off the reservation in disproportionate numbers. The feeling among many Indian tribes is that, as

a result of this tendency, the tribes are losing control of a valuable resource, namely their own children.[8]

Testimony before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs in April 1974 was largely directed to this issue. Senator Abourezk, Chairman of the Subcommittee, summarized the testimony at one point as:

> Witness after witness got up and testified that non-Indian social workers have been totally ignorant of exactly what an Indian family is and what it ought to be; that their standards, referring to non-Indian social workers, the standards they develop on whether or not a mother was a good mother or a parent was a good parent, were based on their own standards, not on Indian standards, which are quite often different, and that as a result judging the fitness of the parent or the closeness of the family unit on their own standards, that they then took all kinds of illegal, deceptive actions to try to get Indian children away from their mothers.[9]

North Dakota, in its Department of Social Service Manual, makes reference to this point, as follows:

> By tribal resolution, press release, and otherwise the Indian people have made known a concern over the removal or possible removal of Indian children from the reservation to a non-Indian culture off the reservation. This concern is also to be recognized and respected.[10]

The internal HEW memorandum[11] which was a prelude to the program instruction addressed itself at some length to this problem, in terms of legal alternatives:

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[8]Meaningful statistics on this issue are hard to obtain. The Association of American Indian Affairs is the only organization, to date, which has done so for Oklahoma, Arizona, Minnesota, South Dakota, State of Washington, and Wisconsin. These statistics appear in the Hearings on pages 40, 72, 75, 84, 89, 92 respectively.

[9]p. 449.

[10]No. Dak. Social Work Manual, Chapter 423, Section 4, Par. 2.

[11]See, fn. 97, Section IV.

> The standards which have been set are based on material criteria (sufficient living space, proper sanitation facilities, etc.) and do not take into account whether the child is harmed or not for lack of them. Also not considered are such non-national criteria as the values of living in a cultural community with family and relatives. The standards, it is alleged, are not only of questioned fairness, but their results have led to the break up of countless families, and according to several hearing witnesses, have caused the creation and continuation of psychological problems for both the Indian parents and their children.
>
> The issue has been raised, in regard to child welfare programs relating to Indian children living on reservations, whether a state may set a different standard for approving reservation Indian homes for foster care and adoption than it uses for other groups. In determining this, two questions must be answered: will a different standard be consistent with the Social Security Act and will it also be in harmony with the Equal Protection Clause of the 14th Amendment . . .[12]

The memorandum sought to determine the meaning of 45 C.F.R. § 205.120(a) which requires that a state plan:

> . . . shall be in operation, through a system of local offices, on a state-wide basis in accordance with equitable standards for assistance and administration that are mandatory throughout the state; . . .

In conclusion, it discussed the definition of "equitable standards":

> This should not be construed to mean that standards for reservation Indians may not be different from those non-reservation recipients across the state. If a standard produces substantially different results in one political subdivision of the state as contrasted with another, the standard is not uniform in terms of the results produced. Because the statute is directed toward a specific goal, solidarity of the family unit, it is the achievement of this goal that must be uniform and not the technical structure of the program.[13]

The language in the program instruction in reference to the meaning of "equitable standards" is similar to that of this internal memorandum.

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[12] PI, supra n. 2, pp. 5-6.

[13] Ibid., p. 6.

The instruction's conclusion presents two problems, one technical and the other theoretical. Federal Interagency Day Care Requirements (FIDCR) are binding upon the states and SRS.[14]

The FIDCR appear at 45 C.F.R. §§ 71.1 et seq. and are specifically applicable to Title IV-A and B programs.[15] They are passed pursuant to the Economic Opportunity Amendments of 1967 which require the Secretary of Health, Education, and Welfare and the Director of the Office of Economic Opportunity to coordinate day care programs so as to obtain, if possible, a common set of program standards and regulations.[16] However, these requirements may be waived under certain circumstances:

> Requirements can be waived when the administering agency can show that the requested waiver may advance innovation and experimentation and extend services without loss of quality in the facility. Waivers must be consistent with the provisions of law. Requests for waiver should be addressed to the regional office of the federal agency which is providing the funds. Requirements of the licensing authority in a state cannot be waived by the federal regional office.[17]

The appropriate office has not yet commented upon the instruction.

The memorandum upon which the program instruction is based expresses great awareness of the equal protection issue which lies behind the implementation of different standards to achieve equitable goals, citing Dandridge v. Williams.[18] The memorandum states:

> In the case at hand, the classification upon which the standard would be based is Indians on reservations. The basis for the difference is clear: Indian culture and life style on reservations differ from that off reservations and require different treatment in order to fulfill the purpose of AFDC, which is to encourage family solidarity rather than destroy it.[19]

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[14] 45 C.F.R. §§220.18(c)(2) and 220.56(a)(8).

[15] 45 C.F.R. § 71.2(a).

[16] 42 U.S.C. § 2932(d).

[17] 45 C.F.R. § 71.4. This waiver may not be possible under the new Title XX. See 42 U.S.C. § 2002(a)(9)(A)(ii).

[18] 397 U. S. 471 (1969) rehearing denied, 398 U. S. 914 (1970).

[19] PI, supra n. 2.

An argument can be made that the need for different standards for equitable goals applies to many ethnic groups, such as the Mexican migrants, or black inner-city dwellers. Without discussing the validity of that point, it is perhaps legally more significant that Indians occupy a unique political status in the United States. The memorandum itself falls back on this point:

> The reservation Indians occupy a unique position in the United States, being the only judicially recognized minority group with a semi-nationality all their own.[20]

Morton v. Mancari[21] re-established this legal principle with reference to hiring and promotional practices within the Bureau of Indian Affairs and the Indian Health Service where Indians, because of their political status, are to be given "preference." "Preference" does not apply to other ethnic groups, nor to other governmental agencies.

Title XX of the Social Security Act

On January 4, 1975, Congress enacted a new statute Title XX of the Social Security Act, effective October 1, 1975, for social services. This statute replaces the Title IV-A provisions for social services for persons eligible for and/or receiving assistance under the AFDC program, but does not alter either the Title IV-A provisions of assistance to AFDC recipients or the Title IV-B program of child welfare services. The authorized annual appropriation under Title XX remains the same $2.5 billion amount that had applied since 1972.[22] There are significant changes, however, in the limitations placed on the states.

Prior to Title XX, each state which participated in the Title IV-A program was required to provide a number of different services, listed in the regulations.[23] This new statute gives states

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[20] Ibid.

[21] 94 S. Ct. 2474 (1974).

[22] See 42 U.S.C. § 1320b(b)(1).

[23] 45 C.F.R. §§ 220.16-220.24.

a much broader range of discretion. Now states are only required to provide one specific service--family planning services--and "at least one service directed at each of" five generally stated goals.[24] The decision as to which services shall be provided is left entirely up to the states, with HEW deprived of the power to withhold funds if certain services are not required. In fact, HEW is not even permitted to withhold funds for any expenditure on the ground "that it is not an expenditure for the provision of a service."[25] The reason for this greatly expanded state discretion, as stated in the Senate Report is that HEW:

> . . . can neither mandate meaningful programs nor impose effective controls on the states. The Committee believes that the states should have the ultimate decision-making authority in fashioning their own social services programs within the limits of funding established by the Congress.[26]

There were also changes in the wording of the "single state agency" and "statewideness" requirements for state plans. Under Title IV-A each state plan must either provide for the establishment or designation of a single state agency to administer the plan, or provide for the establishment or designation of a single state agency to supervise the administration of the plan. The new Title XX changes this to "an appropriate agency," by requiring that each state plan provide:

> for the designation . . . of an appropriate agency which will administer or supervise the administration of the state's program for the provision of the services described in section 2002(a)(1).[27]

The argument could be made that the use of "appropriate agency" instead of "appropriate state agency" in Title XX provides greater

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[24] 42 U.S.C. §§ 2004(2)(B), 2002(a)(1). There is one additional requirement, that each Title XX state must make at least three types of services, as determined by the state, available for recipients of Title XVI supplemental security income benefits.

[25] 42 U.S.C. § 2002(a)(3).

[26] 1974 U. S. Code Cong. & Admin. News 9193, 9198.

[27] 42 U.S.C. § 2003(d)(1)(C).

flexibility for the state to delegate the administration of parts of its program to a public agency which is not part of the state governmental system--an Indian tribal government, for example. But this is not the approach taken in the proposed Rules for the implementation of Title XX. These proposed Rules[28] require the designation of an appropriate state agency to oversee all of the Title XX program.

A major change was made in the "statewideness" requirement. As previously provided, each AFDC state plan must "provide that it shall be in effect in all political subdivisions of the state, and, if administered by them, be mandatory upon them."[29] This has meant that the same services must be available throughout the state. While the new "statewideness" requirement in Title XX[30] is virtually the same as that for Title IV-A,[31] there is language in the statute which provides that each Title XX state's annual "proposed comprehensive services program plan" must include statements concerning:

> the geographic areas in which . . . services are to be provided, and the nature and amount of the services to be provided in each area.[32]

The proposed Rules spell out the effect of this new language:

> (a) For the purpose of delivering services described in the services plan, the state agency may divide the state into geographic areas. Geographic area means any identifiable area encompassed with [sic] the state so long as every political subdivision of the state, including Indian reservations, is a part of one or more such areas. The services plan shall describe the geographic areas.
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> (b) The services plan shall provide that services described in §228.26(b)(1) and (2) will be available to eligible individuals in every geographic area.

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[28] 40 Fed. Reg. 16803 (1975), proposed 45 C.F.R. § 228.6(a).

[29] 42 U.S.C. § 602(a)(1).

[30] 42 U.S.C. § 2003(d)(1)(H).

[31] The clause "and if administered by them, be mandatory upon them" is deleted. However, this seems to be redundant, and its deletion, by itself, does not appear to be significant.

[32] 42 U.S.C. § 2004(2(b).

> (c) Notwithstanding the requirement under paragraph (b) of this section, the state may provide different services in different geographic areas, but within a geographic area eligible individuals must be offered the same services.[33] (Emphasis Supplied)

This means that a state can provide a considerably greater range of services in one geographic area than in another. Conceivably, a state could even set aside Indian reservations as separate geographic areas in which minimal services would be provided, while residents of the rest of the state would be entitled to many more services.[34]

In order to prevent abuses of state discretion, Title XX requires that each state provide for greatly expanded citizen involvement in the formulation of the state plan. This includes publication of the proposed annual plan at least 90 days before it is implemented, acceptance of "public comment" by written comments and/or public hearings on the proposed plan, and publications of the final annual plan before the beginning of the program year.[35] The purpose of these procedural requirements is to open up the state's plan for public scrutiny, thus giving various citizens' groups an opportunity to influence the state's determination of social services needs and priorities.

There are other changes resulting from Title XX. Some of these, as a new approach to state licensing or approval of foster

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[33] 40 Fed. Reg. 16805 (1975), proposed 45 C.F.R. § 228.25.

[34] Such differential treatment, especially if it involves elements of racial discrimination, is subject to challenge on equal protection grounds. One way in which this issue might arise would be a lawsuit by an AFDC recipient who had been receiving a particular service before Title XX and became ineligible for this service because the state failed to provide it in that person's geographic area, though it provided the same service in other areas of the state. It is quite possible that the courts will hold that the equal protection clause requires that the same services be available to all residents of the state, regardless of the more permissive Title XX provisions.

[35] 42 U.S.C. § 2004 (2-4); 40 Fed. Reg. 16805-06 (1975), proposed 45 C.F.R. § 228.33.

homes and day care facilities, are explained elsewhere in this report (licensing is discussed above in this Section).

Others, such as national income eligibility limits, are important generally but not pertinent to this study. All in all, Title XX promises to be an interesting experiment in structuring federal-state relationships in the social welfare field.

The Navajo Social Services Project

The Navajo Nation desired to have uniform standards of eligibility and percentage of need, as well as uniform services, on its reservation which covers three states. For this reason, it decided to obtain a grant through a 1115 demonstration project where the tribe itself would contribute the state's share of 25%.

The Navajo Nation is atypical of Indian tribes for a number of reasons: it is by far the largest tribe at present, 140,000 Navajos living on the reservation; the size of the reservation is 14,850 square miles, roughly the size of Massachusetts, Connecticut and Rhode Island; and the tribe is comparatively wealthy, although individual members on the whole live at a poverty level.

Despite the fact that the tribe was willing to contribute the state's 25%, the Navajo Social Services Project has encountered one legal hurdle after another. It required a waiver of statewideness under the Social Security Act; it required a Regional Attorney's opinion confirming that it was a public agency for purposes of the Social Security Act; the Attorney General of Arizona issued an opinion that tribal funds, once co-mingled with general funds of the state, could not be redistributed to the tribe; this resulted in a lawsuit whereby the state's social service agency, Department of Economic Security (DES), attempted to sue the State Department of Administration; and ultimately--because of problems of standing--the tribe itself, as well as the cities of Tuscon and Phoenix, were substituted for DES in the lawsuit and won their case. 163

The irony of the Navajo Project is that now, after the tribe has spent three years trying to get the program off the ground, it has been suggested that the tribe scuttle the demonstration project which has yet to be approved by Washington and come under Title XX. One must note as well that only as a result of a statement in the state-written Navajo proposal that "Arizona provides no services to Reservation residents" was the Region IX office of HEW made aware of this state of affairs. The procedural blocks and hesitancies by which delivering services to Indian reservations is attended--even where the tribe is able to put up the money--are nowhere more revealingly seen than in the history of the Navajo Project.

The history of the Navajo Social Services project offers a case study of the extremely complex route by which, under present circumstances, a tribe may contract for HEW funds through a state. The following events are chronological points on the route:

November 12, 1973	Memorandum from Office of Regional Attorney, San Francisco, to SRS/ Community Services; concludes that tribe may be considered "public agency" for purposes of Title IV-A.
July 19, 1974	Arizona Attorney General's opinion to DES, ruling that tribe may not earmark funds put into state's general fund, effectively halting the project for the moment.
July 22, 1974	The Proposal, from DES, on application for Title XI, Section 1115 of SSA, for demonstration funds for the Navajo Social Services Project.
September 18, 1974	Memorandum from Director, Office of Policy Control, to Gary Massell, Ph.D., Associate Administrator for Planning, Research and Development, SRS.
November 18, 1974	Navajo Tribe v. Arizona Department of Administration, 528 P.2d 623. The Arizona State Supreme Court decision permitting DES to act as conduit for Navajo funds.

The first legal problem which the project had to overcome was contained in the federal regulations:

> Public funds, other than those derived from private resources, used by the state or local agency for its services programs may be considered as the state's share in claiming federal reimbursement where such funds are:
>
> (1) Appropriated directly to the state or local agency; or
>
> (2) Funds of another public agency which are:
>
> (i) Transferred to the state or local agency and are under its administrative control;
>
> (ii) Certified by the contributing public agency as representing current expenditure for services to persons eligible under the state agency's services programs, subject to all other limitations of this part.
>
> Funds from another public agency may be used to purchase services from the contributing public agency, in accordance with the regulations in this part on purchasing of services. [36]

The problem was whether the Navajo tribe is a "public agency" within the meaning of the regulation. If tribal funds are considered private funds, a reversion of them to the donor--the tribe--would preclude the state from receiving federal participation for these expenditures.[37] The terms "public agency" and "public funds" are not defined in Title IV-A of the Act or in the implementing regulations.

To deal with this dearth of definition, the Regional Attorney referred to the Federal State Revenue Sharing Act[38] where "unit of local government" is defined to "include . . . the recognized governing body of an Indian tribe or Alaskan native village which performs substantial governmental functions," and to the Older Americans Comprehensive Services Amendments of 1973[39] where " A unit

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[36] 45 C.F.R. § 221.61(a) (October 31, 1973).

[37] As implied in 45 C.F.R. § 221.61(a) and explicitly stated in 45 C.F.R. § 221.62.

[38] Pub. L. No. 92-512, § 108(d)(1).

[39] Pub. L. No. 93-29, §302(2).

of general purpose local government' is defined as "an Indian tribal organization."

The Regional Attorney concludes that:

> . . . in view of the recognized principle that Indian Tribes exercising substantial governmental functions independent of a state possess the attributes of a limited sovereignty, and in light of the above-referenced Congressional mandates directing the Secretaries of certain federal agencies under specified circumstances to recognize the governing body of an Indian Tribe as a "unit of local government" (i.e. a public agency); . . .

the Navajo Tribal funds could be considered public funds for purposes of federal participation under Title IV. The Central Office (the Human Resources Division of the Office of the General Counsel) "concurs in these conclusions."

It was next necessary to consider the problem of "statewideness." For AFDC, 42 U.S.C. § 602(a)(1) requires that:

> (a) A state plan for aid and services to needy families with children must
>
> (1) provide that it shall be in effect in all subdivisions of the state, and, if administered by them, be mandantory upon them.

In addition, 45 C.F.R. § 205.120 requires statewideness.

Because the Navajo Project involved a number of optional programs, including child welfare programs, not provided by Arizona in its overall state plan, it was necessary to waive the statewideness requirement. This is permitted in demonstration projects under Section 1115(a) of the Social Security Act, as follows:

> In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of . . . part or all of Title IV, in a state or states--
>
> (a) the Secretary may waive compliance with any of the requirements of section . . . 402[40] . . . as the case may be, to the extent and for the period he finds necessary to enable such state or states to carry out such project, . . .

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[40] 42 U.S.C. § 602.

The Arizona Department of Economic Security (DES) requested a waiver of the statewideness requirement,[41] but there was no record or discussion of a waiver of the single state agency requirement. Apparently, as DES retains some control, such as over eligibility, this was not considered necessary. The request was for a one year period with an option to renew for two additional years on the basis of the progress and experience of the first year.

The Arizona State Attorney General on July 19, 1974 handed down an Opinion directed toward county contributions to DES, as well as Arizona Department of Health funds to DES, and touching upon, as a result, Indian tribe contributions to DES. None of the questions posed to the Attorney General by William Mayo, the Director of DES, involved Indian tribes *per se*.

The Attorney General found that public funds paid into the state treasury had to be credited to the general fund and that once so credited, they could not be earmarked for a particular program without an appropriation by the legislature. Exceptions to this rule were "private funds," "federal funds," and "specific state funds" designated by legislative enactment for a particular purpose.

To quote the opinion:

> . . . the statutory scheme contemplates that all monies received by the state from sources other than the federal government (A.R.S. § 35-142.C), private sources (A.R.S. § 35-142.A.3) and special state funds (A.R.S. § 35-142.A.6) must be credited to the general fund. These provisions govern all agencies. The Department of Economic Security must therefore exercise its broad grants of authority to incur obligations (A.R.S. § 41-1954.6), contract with and assist other agencies (A.R.S. § 41-1954.7) and accept grants, matching funds and direct payments from public and private agencies and expend the same (A.R.S. § 41-1954.9), subject to the limitations imposed by A.R.S. §§ 35-141, 35-142 and 35-148 that funds not within the above discussed exceptions flow into the general fund and out of agency control.[42]

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[41] Letter of July 3, 1974 of DES to Charles Sylvester, Acting Regional Commissioner, DHEW, San Francisco.

[42] Arizona Attorney General's Opinion No. 74-12, July 19, 1974, part I, p. 4.

The question of whether funds from Indian tribes are public or private in nature was taken up only parenthetically later on in the opinion:

> As has already been pointed out, the Department of Economic Security is free to accept public funds (federal government, Indian tribes, and political subdivisions of the state) and private funds. The limitations imposed by the finance code would require all funds from a non-federal public source to be credited to the general fund.[43]

The Attorney General concluded state laws would have to be changed:

> When the Attorney General invests the time and effort that opinions of this magnitude command, it is disheartening for the end product to be so at odds with the requesting agency's goals for serving the people. We reluctantly conclude that the strictures of another era contained in our finance code erode the Department of Economic Security's ability to finance adult social services programs. These difficulties are creatures of the legislature. Although the legislature has rejected finance code changes removing some of the restrictions discussed herein as well as funding for adult social services, it is still the only instrument of government capable of resolving these problems. The Attorney General can only explain and abide by what the legislature has wrought.[44]

Acting upon this ruling, the Finance Department of the Arizona Department of Administration refused to pay DES obligations it had incurred in connection with on-going job training and employment programs administrered by it. On August 20, 1974, DES sued in Arizona's Supreme Court, filing a special action in mandamus against the Arizona Department of Administration. However, it ran squarely into the standing issue. On September 5, 1974, the Supreme Court ordered a 10 day stay to permit "amici curiae, one or all" to be "substituted as petitioners to cure apparent jurisdictional defect." On September 6, 1974, the Navajo Tribe moved to be substituted for Petitioner, stating:

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[43] Ibid., part IV, p. 7.

[44] Ibid.

> Respondent's unreasonable, arbitrary, and illegal refusal to disburse monies under the Concentrated Employment Programs . . . has directly and adversely affected the interests of the Navajo Nation and its members and has seriously jeopardized the Navajo Concentrated Employment Program, . . .

In addition, the City of Phoenix was admitted as petitioner with regard to its CEP program and the City of Tucson as intervenor with regard to one of its programs.

The Arizona Supreme Court answered the question in a unanimous opinion. In pertinent part:

> Payment of funds into the state treasury does not necessarily vest the state with title to those funds. Ross v. Gross, 300 Ky 337, 188 S.W.2d 475 (1945). Only monies raised by the operation of some general law become public funds. Cyr & Evans Contracting Co. v. Graham, 2 Ariz. App. 196, 407 P.2d 609. The term "public funds" refers to funds belonging to the state and does not apply to funds for the benefit of contributors for which the state is a mere custodian or conduit. Pensioners Protective Assn. v. Davis, 112 Colo. 535, 150 P.2d 974 (1944). The same is true of the term "general fund." This is made clear by the language of A.R.S. § 35-142 "funds received for and belonging to the state."[45]

The Court proceeded to pin point the ability of DES to enter into contracts with the Navajo Tribe and with the cities of Phoenix and Tucson under Arizona law, citing specific statutory provisions:

> [7] DES is empowered to enter into such contracts as have been made with the Navajo Tribe and the cities of Phoenix and Tucson in accord with A.R.S. §§ 46-134(4), 41-1954(6) and 41-1954(7):
>
> § 46-134. "The state department [of economic security] shall . . .
>
> "6. Assist other departments, agencies and institutions of the state and federal governments, when requested, by performing services in conformity with the purposes of this title."
>
> § 41-1954. [T]he department shall:
>
> "6. Make contracts and incur obligations within the general scope of its activities and operations subject to the availability of funds."

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[45] Navajo Tribe v. Ariz. Dept. of Admin., 528 P.2d 623, 625.

"7. Contract with or assist other departments, agencies and institutions of the state, local and federal governments in the furtherance of its purposes, objectives and programs."[46]

Without specifying how, the Court apparently found that the Navajo Tribe was an "agency" within the meaning of these provisions.

The Supreme Court opinion does not answer the question of whether Navajo funds are, for state purposes, to be considered public or private. Rather, it strongly implies that the CEP funds are to be considered federal funds and the city and tribe are simply conduits for the federal money:

> It is within the power of the legislature to make appropriations relating to state funds, but funds from a purely federal source are not subject to the appropriative power of the legislature . . . .
>
> The money provided in these instances by the federal government to petitioners and to the intervenor determines the availability of funds with which DES operates for purposes of administering these social services contracts . . . .
>
> The prime contracts with the Department of Labor provide that certain of the funds will be used to reimburse the subcontracting agency, DES, for administrative costs. Thus, the administrative costs are being paid from federal funds made available for that purpose.[47]

It is unclear whether the decision is based on a "conduit" theory or a "federal fund" theory, which by state law would not require any invocation of a conduit theory, or both.

What is clear is that the decision, looked at carefully, has nothing whatever to say about the Navajo Social Services Project--where the money conduited would be from the Navajo Tribe itself as source and not from the federal government--or about whether the tribe would be a public or private agency under these circumstances. Legally, of course, the mandamus action and the opinion

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[46] A.R.S. §§ 46-134(6), 41-1954(6) and 41-1954(7).

[47] 528 P.2d at 625.

only affect the CEP program, and further the facts of the Navajo Social Services Project are not entirely on point with the facts ruled on by the Arizona Supreme Court.

Nevertheless, the opinion was taken by everyone concerned as the fall of the final barrier to approval of the Navajo Project.

This case history points up some continuing issues. Legislation, whether federal or state, which is general legislation has frequently not been drafted taking into account the existence of Indian tribes. Perhaps this is inevitable, as few federal congressmen have large Indian constituencies.

This creates unnecessary and distressing problems. A simple sentence in the federal regulations to the effect that "Indian tribes are to be considered public agencies," would have done away with much of the difficulty on the federal level for this project, if the draftor of regulations can reasonably justify that point as within the Congressional intent. The same sentence in the state statutes would have cleared up much confusion there.

Another issue highlighted is that state statutes can be controlling in determining what is feasible and what is not in the delivery of child welfare services to Indian reservations. In any system where funds or services come through the state, an examination of each state's laws and practices, as they impinge upon such a project, has to be made.

The Indian Self-Determination and Education Act

This Act[48] affects the administration of programs of the Bureau of Indian Affairs and the Public Health Service. Specifically, it defines procedures for these governmental agencies to let contracts and make certain direct grants to Indian tribes and tribal

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[48] 25 U.S.C. § 450 et seq.

organizations. The Act's Congressional findings, which are a prelude to the provisions describing the mechanism, contain this wording:

> . . . The prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities.[49]

In the Declaration of Policy which follows, the Act reads in part:

> The Congress declares its commitment to the maintenance of the federal government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from federal domination of programs.[50]

Thus, on one hand, the Act contains the strongest Congressional expression in recent years against past federal policy toward Indians as paternalistic. On the other, it proposes a present day course toward increased Indian control, rather than federal control, of the "planning, conduct, and administration" of Indian programs. The Act's prelude therefore reflects the trend described in detail in the "Public Agency" section of this report, and represents another step in recent administration policy of "self-determination" for Indians.

The Act is divided into two titles: Title I is the "Indian Self Determination Act."[51] Title II is the "Indian Education Assistance Act."[52] For the purposes of this report, discussion is confined to Title I.

Title I is divided, in turn, into two main parts: the first

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[49] Sec. 2(a)(1).

[50] Sec. 3(b).

[51] Sec. 101 et seq.; 25 U.S.C. §§ 450(f) et seq.

[52] Sec. 201 et seq.; 25 U.S.C. §§ 455 et seq.

permits contracts by the Secretaries of the Interior and of HEW to Indian tribes;[53] the second permits contracts or direct grants to Indian tribes by these Secretaries for the purpose of strengthening tribal government and building tribal capacity.[54] These two main parts of the Act interrelate; that is, direct grants or contracts may be made for the purpose of planning, training, evaluation or other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to the first part. Other sections of the Act define mechanisms for personnel, administration, promulgation of rules and regulations, reports, and discontinuance of contracts and grants under certain circumstances.

The Act specifically includes welfare assistance and services, and by implication child welfare assistance, and social services presently performed by the Bureau of Indian Affairs and the Indian Health Service. The crucial section reads:

> The contracts authorized under sections 102 and 103 of this Act and grants pursuant to section 104 of this Act may include provision for the performance of personal services which would otherwise be performed by federal employees including, but in no way limited to, functions such as determination of eligibility of applicants for assistance, benefits, or services, and the extent or amount of such assistance, benefits, or services to be provided and the provisions of such assistance, benefits, or services, all in accordance with the terms of the contract or grant and applicable rules and regulations of the appropriate Secretary;[55]

From the tribal point of view the Act contains a number of procedural protections. If the Secretaries of either Department declines to enter into a contract at the request of a tribe, he must state his objections within 60 days, must provide "practicable assistance" to the tribe to overcome his objections, and must provide

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[53] Sec. 102 and 103 respectively.

[54] Sec. 104(a) and (b).

[55] Sec. 106(f).

a hearing and an appeal of the hearing.[56] In addition, the amount of funds provided under the terms of the contracts "shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs . . ."[57]

Lastly, three other provisions are of particular significance: First, capacity building grants "may be used as matching shares for any other federal grant programs which contribute to the purposes of . . ." capacity building. [58] Capacity building includes the "strengthening or improvement of tribal government" and "planning, training, and evaluation."[59] Second, tribal organizations with which grants and contracts are made are defined to include inter-tribal organizations, provided that "the approval of each . . . Indian tribe" to which services are to be rendered is obtained.[60] Third, contracts other than those for capacity building may not be for a term to exceed one year "unless the appropriate Secretary determines that a longer term would be advisable: Provided, that such term may not exceed three years . . ."[61]

This Act can be regarded as an attempt to codify the improvisational procedures which the Bureau has been using in order to contract with Indian tribes. The House Report summarizes the procedures which have previously been used and led eventually to the Self-Determination Act:

> To accomplish this the Administration relies on a combination of four basic Acts: through the use of the "Buy Indian" Act of 1910 (36 Stat. 861) competitive bidding of contracts with Indian tribes can be waived: where the contracts relate directly to educational services for Indian

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[56] Sec. 102(b); Sec. 103(b).

[57] Sec. 106(h).

[58] Sec. 104(c).

[59] Sec. 104(a)(1) and (2).

[60] Sec. 4(c)

[61] Sec. 106(c).

> children in public schools, authority is found in the Johnson-O'Malley Act of 1934 (48 Stat. 596), as amended; while other services are contracted for through the Snyder Act of 1921 (42 Stat. 208). Where federal employees are involved in the operation of contracts, the Department of Interior resurrected an 1834 Act (4 Stat. 737) to authorize tribal supervision over the federal employees. This curious mixture of broad interpretation and unrelated statutes represented an attempt by the Department to improve the quality of education and other services and to promote greater self-determination for Indian tribes. The difficulties in straining statutory language beyond its original intent creates numerous administrative and management problems which this legislation is designed to correct . . . .
>
> While the aforementioned statutes have provided some necessary tools to permit federal agencies to contract with tribal groups, a more flexible authority is needed in order to give substance and credibility to the concept of Indian self-determination.[62]

Title I is a conglomeration of the objectives of three house bills introduced by the Administration:

HR 6372:	Providing for Indian control of federal programs.
HR 6376:	Amending the Johnson-O'Malley Act to include Indian tribes as eligible contractors.
HR 6853:	Providing for transfer of a federal employee to tribal employment with maintenance of civil service fringe benefits and certain rights to federal re-employment.

The first bill gave to the tribe the right to determine whether and when they were ready to assume control and operation of a federal program, with the Secretaries retaining only a limited discretion to refuse to contract. Certain Indians would have preferred the retention of this provision.[63] They remain suspicious of whether the Bureau will actively push for contracts and grants.[64]

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[62] H.R. 93-1600. 1974 U. S. Code & Cong. Admin. News, 7781-7782.

[63] Discussion in "Alternatives Conference," Denver Research Institute, April 28, 1975.

[64] Cf. e.g. The Denver Post, Wed., March 26, 1975, p. 32 where the chairman of the Hopi Tribe "voiced concern about the federal government not allowing his people to take full advantage of the Indian Self-Determination and Assistance Act of 1975."

However, the Act does provide procedural safeguards which were entirely absent in the past, that is: the Secretary must state his reasons, hold a hearing, and permit an appeal.[65] In addition, the Act provides for tribal capacity building and thus it fills what has so often been an unbridgeable gap to tribal control of federal programs, namely that the smaller tribes in particular do not have the training or expertise to administer programs on their own.

Implementation of contracts in the child welfare aid and services might effectively solve some of the problems ennumerated in this study, by providing to tribes greater capability concerning and control over child welfare programs. In addition, the Act highlights the trend toward codification of ad hoc contracting procedures and stands as further evidence that legal barriers to permitting tribal control are rapidly falling. It should be added, however, that the Act remains to be evaluated; and that it does not affect HEW/SRS programs. Thus, fundamental legal and jurisdictional problems of the present system are not directly affected by the Indian Self-Determination Act of 1975 and the Act stands only a possible guidepost on the road to the solution of those problems.

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[65] It must be noted, however, that these safeguards do not apply to capacity building contracts and grants.

VI. ALTERNATIVES

Thus far in this report we have explored the general and specific legal and jurisdictional problems involved in the delivery of certain SRS programs to Indians on Indian reservations. After discussing the background of Indian law, Indian courts, and the SRS and BIA social welfare programs, we examined specific problems that have arisen in the administration of these programs. These problems have included state licensing of foster homes and day care facilities on the reservation, state recognition and enforcement of tribal court orders, and state treatment of Indian tribal governments as "public agencies." Finally, we have reviewed several new approaches for the delivery of these services.

This Section is concerned with alternatives to the current system of SRS and BIA social services for Indians. The purpose of suggesting these alternatives is to explore ways of restructuring these programs and improving services for Indians. Each alternative is discussed separately, with an outline of the necessary changes in federal statutes and regulations and some of the more significant policy implications.

This Section does not examine the many changes in state or tribal law that may be necessary to accomplish any of these alternatives. This report has had as its focus federal statutes and regulations, not the greatly differing constitutional and statutory provisions of the various states and tribes. Such a detailed analysis is beyond the scope of this report, although we again emphasize that state and tribal level modifications are essential to accomplish the changes.

There are four major alternatives:

- the status quo with some modifications
- state contracts with tribal or intertribal organization
- federal contracts with tribal or intertribal organization
- a totally federally-administered program.

Status Quo With Modifications

It would be possible to continue the same basic administrative structure as currently exists, with some relatively minor modifications, such as greater Indian involvement in the planning, administration, and delivery of services. It is assumed that this would involve retention of both the SRS and BIA social welfare programs. As an inducement for the states to provide assistance and services to Indians, Congress could decide to revise the matching formula for that portion of the state's program having Indian recipients. It is true, in a strictly legal sense, that the states are obligated to provide these programs to Indians under existing matching amounts.[1] However, there may be an advantage in providing special federal financial assistance rather than attempting to force reluctant states into compliance, while Indian recipients, otherwise eligible, are deprived of assistance and services. There are a number of matching formulas that might be chosen, including an extension of the Navajo-Hopi Act[2] formula to all on-reservation Indians.

Greater Indian involvement in state programs could be achieved by employing more Indians in the state and county agencies dealing with significant Indian caseloads. These Indian employees could help assure that these programs are provided in a way that best meets the needs of the Indian recipients. The problem with increasing the number of Indian employees is the fact that states and counties administer these programs, which increases the administrative difficulty for SRS in monitoring and enforcing such a requirement. Partial statutory authority

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[1] See State ex rel. Williams v. Kemp, 78 P.2d 585 (Mont. 1938); Acosta v. San Diego County, 126 Cal. App.2d 455, 272 P.2d 92 (1954).

[2] 25 U.S.C. § 639.

for federally-mandated hiring of a greater number of Indians can be found in Title VI of the 1964 Civil Rights Act,[3] which forbids employment discrimination in federally-funded programs. For an affirmative requirement for a higher level of Indian employees, one could look to the Affirmative Action Plans required of state agencies. The enactment of new statutory provisions, similar to the Indian preference statute for the BIA and IHS (Indian Health Service of HEW),[4] which would require that Indians be granted preference in employment for those programs that are provided to Indians, has been suggested by some observers. It is not certain whether such an affirmative action requirement would be constitutional.[5]

An additional problem that has arisen in some states--the refusal of state institutions to accept placements of reservation Indians pursuant to tribal court order, as fully discussed in Section IV--could be alleviated in a number of ways. States and tribes could enter into compacts for the reciprocal recognition and enforcement of their court orders. Or Congress could amend the statute[6] which implements the full faith and credit clause by making it explicit that tribal court orders are to be granted full faith and credit.[7]

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[3] 42 U.S.C. § 2000(d).

[4] 25 U.S.C. § 472.

[5] The Indian preference statutes were found to be constitutional because of Indians' unique relationship with the BIA. Morton v. Mancari, 94 S. Ct. 2474 (1974). The "lives and activities" of members of federally-recognized tribes are not governed by SRS in the same way as they are by the BIA. And since employment of more Indians is not, strictly speaking, the result of tribal sovereignty (as would be special arrangements in the area of licensing), an Indian preference law for state agencies can be challenged as invalid racial discrimination.

[6] 28 U.S.C. § 1738.

[7] It is possible that this approach might not require reciprocity. The constitutional provision applied to the states, and 28 U.S.C. § 1738 could be amended to require that the states recognize and enforce the judgments and orders of tribal courts. This would not mandate, at least as a constitutional obligation, the granting of full faith and credit by Indian tribes to state court orders.

Further, the public agency issue, detailed in Section III, could be addressed by a comprehensive review of Federal regulations, specifically designating Indian tribes or tribal agencies as public agencies, using the reasoning developed by HEW Regional attorneys in Regions VIII and IX.

Overall, this alternative would not require major changes in existing statutes and regulations. There might be a major impact on tribal sovereignty if the states were to become very active in child-welfare matters for Indians living on the reservation. If cases involving such Indian children were to be adjudicated through the state courts, or if state agencies attempted to enforce their standards for foster homes or day care facilities through the imposition of civil or criminal penalties, then the full development of tribal self-government would be impaired.

It should also be noted that this alternative would not necessarily result in the development of substantial tribal capacity to deal with these problems in P. L. 280 states, nor would any alternative. If the development of tribal capacity, or tribal sovereignty, is a policy goal, then state jurisdiction asserted under P. L. 280 must be retroceeded to the tribes.

State Contracts With Tribes

Another way of structuring these programs would be through contracts between state agencies and tribal governments or intertribal organizations. The state agency would be relieved of most of its administrative functions with respect to assistance and services to on-reservation Indians, and would therefore serve mostly as a conduit for the funds. It is likely, however, that the state would retain some responsibility to monitor the tribal of intertribal programs. While there already is statutory authority for federal-tribal contracts involving the BIA,[8] implementation of a mandatory system for state-contracts with tribes for SRS programs would require additional legislation.

[8]The "Buy Indian" Act, 25 U.S.C. § 47; The Indian Self-Determination Act, 25 U.S.C. §§ 450 et seq.

As with the alternative discussed above, Congress could decide to increase the level of federal funding received by the states for programs with Indian recipients living in Indian country.

There are a variety of potential federal provisions, in statutes and regulations, for state-tribal contracts. One way would be a non-mandatory authorization for states to enter into contracts with tribes. Near the other extreme would be a requirement for the state agency to enter into "purchase of services" agreements with any tribe or intertribal group which requests such agreements. Somewhere between these two possibilities would be a program, similar to the Indian Self-Determination Act,[9] which would authorize contracts if the tribe or intertribal organization which requested such an arrangement had the capacity to provide the assistance and services, given the money to do so. In deciding which of these variations should be applied, there is a tension between the goals of not unreasonably preventing Indians from administering their own programs and ensuring that the tribal or intertribal organization administering these programs has the practical ability to do so.[10]

Whichever of these variations is chosen, one additional aspect of the contracting program could be a provision for improving the capacity of Indian groups to provide assistance and services for their own people. "Capacity-building" essentially means the training of social workers and administrators, and assistance in learning how to comply with the record-keeping requirements for these programs. Again, there are a variety of ways in which this could be accomplished. For example, federal funds could be provided for the establishment of an Indian-controlled program of social work instruction, one with a strong emphasis on providing services within the context of traditional, non-Anglo methods of child-rearing.

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[9] 25 U.S.C. §§ 450 et seq.

[10] One subsidiary issue is who should decide whether a particular tribe or intertribal group has the requisite capacity. This decision could be the responsibility of, for example, SRS, the state, the tribe, or an outside body.

Related to this question of capacity-building is the inclusion of intertribal organizations as possible contracting parties. It is recognized that there are a number of smaller reservation communities which probably would not be capable of administering their own program, if for no other reason than these tribes' small populations. One way of permitting these small tribes to participate in a state-tribal contracting system would be through a centralized administration provided by an intertribal organization representing these smaller tribes. Social workers could travel from reservation to reservation for their normal caseloads, with some system (possibly through cooperative arrangements with county welfare offices) for emergency situations. Discussions with Indian tribal officials and social workers, however, has revealed some reluctance to endorse the use of intertribal organizations due to internal political problems which sometimes hamper the work of existing statewide intertribal groups.

There are a number of changes in statutes and regulations that are needed before a full system of state-tribal contracting could be implemented. First, the term "public agency," used in the Code of Federal Regulations,[11] should be clarified in order to remove any question that, at least as a matter of federal law concerning these SRS programs, tribes are public agencies. In addition, it may be necessary for each state that contracts with Indian tribes to make similar amendments in its own statutes. Second, the federal requirements concerning standards of personnel administration[12] could be waived for demonstration projects only[13] for tribes contracting to provide assistance and services. Such a

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[11] 45 C.F.R. § 220.62(c); cf. 45 C.F.R. § 220.63(b).

[12] 45 C.F.R. § 205.190.

[13] Present authority for this kind of waiver appears to be limited to demonstration projects. See 42 U.S.C. § 1315.

waiver would be a recognition that tribal agencies would want to be staffed with Indian employees, insofar as possible, and might not want to be bound by the requirements of state or federal civil service systems. Another possible waiver--one that would be more controversial--would be a modification of the requirements for public hearings[14] to more closely conform to the Indian Civil Rights Act[15] and tribal customs. Such a modification could provide for more informal hearings within a context of due process--notice of the hearings, opportunity to be heard, impartiality and equal protection.

While some major changes in federal statutes and regulations would be needed to implement this alternative, it would not be necessary to make significant alterations in the basic federal administrative structure. On the federal level, SRS would continue to deal with state agencies. There would be a shift of administration from state or county agencies to tribes or intertribal groups, but this would not require the creation of a new agency. Capacity-building grants could be handled through any one of a number of existing federal agencies, including the BIA's program of capacity-building funding under the Indian Self-Determination Act.[16]

This alternative would better protect tribal sovereignty than the first alternative. For those tribes receiving contracts, resolution of many domestic relations problems of tribal members would remain in tribal agencies and courts. Enforcement of standards for foster homes and day care facilities would also be handled by the tribe, although the setting of such standards and monitoring responsibility must remain with the states unless federal legislative changes occur.

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[14] 45 C.F.R. § 205.10.

[15] 25 U.S.C. §§ 1301 et seq.

[16] 25 U.S.C. §§ 450 et seq.

There may be some difficulties in the area of placements of reservation Indian children in off-reservation state institutions. To the extent that such children are now placed in such facilities, the state's role in providing services on the reservations may be the reason for the acceptance of tribal court orders. Continuation of this relationship after contracting with tribes becomes a reality may require state-tribal compacts for the reciprocal recognition and enforcement of court orders, an amendment to 28 U.S.C. § 1738, or some other device to assure the granting of full faith and credit to tribal court orders.

There may also be some difficulties in P. L. 280 states, where state courts have civil and criminal jurisdiction over Indians in Indian country. It may be necessary for a tribe which has contracted to provide social services to use state, not tribal, courts for cases involving termination of parental rights, civil or criminal penalties for violation of licensing standards, and other matters.

Federal Contracts With Tribes

Another basic method of contracting with Indian tribes or intertribal groups would be through a direct federal-tribal relationship. In other words, the states would be bypassed completely as far as concerns the delivery of these child-welfare programs to Indians living on reservations.

Implementation of this alternative would represent a major policy change in the structure of the delivery of child-welfare services to Indians. Not only would the states be bypassed, but all relevant programs could be consolidated in either the BIA or HEW. This would necessitate increasing the appropriations and staff of the agency which would assume responsibility for all these programs, and may additionally require major changes in federal statutes.

The federal agency administering this program could be the BIA. If so, statutory authority for contracting out assistance

and services presently exists under the Buy Indian Act[17] and the Indian Self-Determination Act.[18] This would require increasing the BIA appropriations to pick up the amounts that have been paid by SRS and state agencies under Title IV-A and IV-B state plans. It would involve a sharp change in policy, which to date has been to deal with needy Indians essentially through the agency charged with responsibility for other needy persons--HEW.

Another way of structuring federal contracts with tribes would be to have these contracts administered by HEW. This would require enactment of a new statute authorizing SRS, or some other agency within HEW, to contract directly with tribes, since all of the existing programs within SRS are administered through federal grants-in-aid to states.

One commentator[19] has suggested that BIA programs could be transferred to HEW, to be administered as part of an Office of Indian Services in HEW headed by an Assistant Secretary. Under this model, there would be three bureaus in this Office: a Bureau of Indian Health (the present Indian Health Service), a Bureau of Indian Education (currently the Division of Indian Education in the BIA), and a Bureau of Indian Development for all other BIA programs, including general assistance and social services.

This alternative, by removing states from the provision of assistance and services to Indians, would probably be funded entirely by the federal government. Very few tribes or intertribal organizations would be able to afford to make a matching grant.

It would be necessary to give a waiver on the Title IV-B "statewideness" requirements[20] to those states within which Indian

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[17] 25 U.S.C. § 47.

[18] 25 U.S.C. §§ 450 et seq.

[19] Schifter, Trends in Federal Indian Administration, 15 So. Dak. L. Rev. 1, 17-19 (1970).

[20] 42 U.S.C. § 622(a)(1). Under Title XX, the waiver would cover the requirement of uniform availability of services throughout a designated geographic area, assuming that the state's Title XX geographic region is larger than the Indian reservation affected by this HEW-tribal contract. There is no requirement in Title XX or its proposed regulations that the same services be available on a statewide basis.

tribes are contracting directly with the federal government. The extent of this waiver depends on the extent of the contracts. For example, if tribes were authorized to provide assistance and services only to Indians on the reservation, then the waiver would not include non-Indians. If, on the other hand, tribes provided these programs to all persons living on the reservation, whether or not they were members of those tribes,[21] then the waiver would cover all persons in that geographic area.

This alternative would require new federal legislation and, if administered by HEW, a new federal agency. It would not impair tribal sovereignty, since programs would be tribally-administered and involve tribal courts. In addition, almost all of the Indians with whom we have discussed these alternatives prefer a direct relationship with the federal government. There appears to be a certain mistrust of state governments and a feeling that state activities on the reservation, even if contracted out to tribes, imply termination.

Another possible variant of the direct tribal-federal relationship which was raised several times in the workshop sessions contemplates a direct congressional grant of money to tribes on a reservation by reservation basis, with no state or federal agency intervening. Presumably, Congress has the power to proceed in such a fashion (e.g., direct congressional relief bills, directing the Treasury to pay designated sums to named individuals).

This alternative raises some extremely interesting questions, largely centered around the concept of accountability. If the executive agency--federal or state--is removed, how is Congress

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[21] An Indian tribe could administer programs which benefit non-Indians, in much the same way as AFDC benefits are--indeed, must be--provided to otherwise eligible aliens. Cf. Graham v. Richardson, 403 U. S. 365 (1971). Cases involving non-Indian recipients, such as petitions for termination of parental rights, would have to be adjudicated by the state courts. It should also be noted that the BIA could not administer contracts of this scope, since its authority under the Snyder Act, 25 U.S.C. § 13, is limited to Indians.

to be assured that the moneys were spent for the congressionally authorized purpose?

This alternative further raises pointed policy questions. Under such a plan, would a tribe assume responsibility for the needy non-Indian living within reservation boundaries? Further, this plan clearly calls into question the assimilationist theory of federal policy towards Indians, as it represents perhaps the most extreme step of any of the alternatives in the tribal sovereignty direction, and the entire present scheme of child welfare programs is geared to treating Indian needs through the same channels used for treating non-Indian needs.

Federally-Administered Program

A fourth alternative would be to administer all of the programs discussed in this report, insofar as they affect Indians, through a federal agency. This would be similar to the current IHS or the BIA social welfare programs--federal social workers would determine eligibility and deliver services, without the direct involvement of state agencies, tribal governments, or intertribal organizations. If administered by the BIA, it appears that the Snyder Act[22] would provide the necessary statutory authority. If under HEW, a new statute, and possibly a new agency within HEW, would be needed.

Certain features of this alternative would be the same as those of the structure of federal contracts with tribes:

'The funding would be 100% federal.

'States in which this program would operate would need a waiver of Title IV-A and IV-B "statewideness" requirements.

'Recognition and enforcement by state agencies of tribal court orders would require separate treatment.

This alternative would prevent the tribes from exercising

[22] 25 U.S.C. § 13.

the option which they now possess of requesting that they administer BIA programs on the reservation. In this sense it would freeze the development of part of tribal self-government into the status it held before the Indian Self-Determination Act.[23] Counterbalancing this somewhat would be the removal of state social workers from the reservation, which would arguably promote tribal sovereignty.

Implementation of Alternatives

The four alternatives sketched out above give an idea of how the current SRS and BIA programs could be restructured. There are disagreements as to which of these is best, and there would be political problems, centered around financial and sovereignty considerations, in implementing some or all of these possibilities. It is hoped that this list will provoke further discussion among federal, tribal, state and county representatives, and will lead to removal of the legal and jurisdictional obstacles to assistance and services to Indians. Certain steps, such as general resolution of the full faith and credit, licensing, and the public agency issues, appear to be necessary for a better delivery system regardless of its form and structure.

[23] 25 U.S.C. §§ 450 et seq.